FILED
(1)
No. 001762 MAY 22 2001
OFFICE OF THE CLERK

In The
Supreme Court of the United States

**C.M., a minor, by and through her parents;
J.M. and E.M., and on their own behalf,**
Petitioners,

v.

**THE BOARD OF EDUCATION OF HENDERSON COUNTY,
a/k/a Henderson County Public Schools; DAN G. LUNSFORD,
Education Department Superintendent; LINDA R. HAWK, Chairman;
JACKIE H. HORNSBY, Vice Chariman; ERVIN W. BAZZEL;
BRENDA O. BROCK; ALLEN A. COMBS; THOMAS E. ORR;
THOMAS B. PRYOR; JUDY DIANE HARTMAN COOK,
in their official and individual capacities,**
Respondents.

**M.E. and P.E.,
on their behalf and on behalf of their son, C.E.,**
Petitioners,

v.

**THE BUNCOMBE COUNTY BOARD OF EDUCATION,
a/k/a Buncombe County Public Schools,**
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Paul Lawrence Erickson
Counsel of Record
**THE LAW FIRM OF PAUL L. ERICKSON, P.A.
1998 Hendersonville Road
Building One, Suite 3
Asheville, North Carolina 28803
(828) 684-7884**

Counsel for Petitioners

THE LEX GROUP • 1108 East Main Street • Suite 1400 • Richmond, VA 23219
(804) 644-4419 • (800) 856-4419 • Fax: (804) 644-3660 • www.thelexgroup.com

129 P

QUESTION PRESENTED

Whether the application of a sixty day statute of limitations, within which a family must file their initial due process action violates the federal policies underlying the Individuals with Disability Act?

PARTIES TO THE PROCEEDING

In addition to those parties listed in the caption, the State of North Carolina participated in the case before the Fourth Circuit Court of Appeals as an Intervenor. The United States of America and the North American School Boards Association participated as Amici Curiae.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

A. Nature of case 2

B. Course of Proceeding 4

C. Disposition of Courts Below 5

REASONS FOR GRANTING THE WRIT 6

CONCLUSION 15

TABLE OF AUTHORITIES

Page(s)

Cases

Birmingham v. Omahas School Dist,
220 F.3d 850 (8th Cir. 2000) 6, 7, 8, 13

C.M. v.
The Board of Education of Henderson County,
241 F.3d 374 (4th Cir. 2001) 2, 12, 13, 14

Canada Life Assurance Co. v. Lebowitz,
185 F.3d 231 (4th Cir. 1999) 14

Combs v. School Board of Rockingham County,
15 F.3d 357 (4th Cir. 1994) 12

County of Oneida v. Oneida Indian Nation,
470 U.S. 226 (1985) 2

Hall v. Vance County Bd. of Educ.,
774 F.2d 629 (4th Cir. 1985) 14

Hendrick Hudson District Board of Education v.
Rowley,
458 U.S. 176 (1982) 14

Janzen v. Knocks County Bd. of Educ.,
720 F.2d 484 (6th Cir. 1996) 9, 10

M.E. v. Buncombe County Board of Ed.,
241 F.3d 374 (4th Cir. 2001) 2, 4, 5, 13

Murphy v. Timberlane Reg'l Sch. Dist.,
22 F.3d 1186 (1st Cir. 1994) 6

Pawlisch, Letter to,
29 IDELR 1088
(OSEP October 22, 1997) 13

Raskin, Letter to,
17 EHLR 1116
(OSEP February 25, 1991) 12

Schimmel v. Spillane,
819 F.2d 477 (4th Cir. 1987) 8, 9, 10, 11

Shook v. Gaston County Bd. Of Edu.,
882 F.2d 119 (4th Cir. 1989) 11

Statutes

121 Cong. Rec. 37416 (1975) 10

20 U.S.C. Sec. 1415 (d)(1) 11

20 U.S.C. § 1400 et seq. 2

28 U.S.C. § 1254(1) 1

28 U.S.C.§ 1291 1

34 C.F.R. § 300.512(a) & (b) 14

34 C.F.R. § 300.512(a)-(c) 2

N.C.Gen.Stat. § 1-17(a) 11

N.C.Gen.Stat. § 1-52 12

N.C.Gen.Stat. § 1-52(a) 11

Rules

Fed. R. App. P. 4 1

Va. Sup. Ct. R. 2A:2 and 2A:4 ..... 9, 11

PETITION FOR A WRIT OF CERTIORARI

CM, a minor, by and through her parents, JM and EM, and on their own behalf, and M.E., and P.E., on their behalf and on behalf of their son, C.E., Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 241 F.3d 374 and is reprinted at App. A-1 through A-29. The opinion of the district court is unpublished and is reprinted at App. A-30 through A-70 The opinion of the Administrative Law Judge is unpublished and is reprinted at APP. A-71 through A-106.

JURISDICTION

The Fourth Circuit Court of Appeals entered its judgment on February 21, 2001. No Motion for Rehearing and Reconsideration was filed. The jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. Section 1254(1). Subject matter jurisdiction provides for judicial review and review of IDEA disputes.

Appellate jurisdiction exists as a matter of right. 28 U.S.C. § 1291 and FRAP 4. Judgment of the court of appeals was entered on February 21, 2001. Jurisdiction in this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Individuals with Disabilities Education Act ("IDEA"), Part B, 20 U.S.C. § 1400 *et. seq.*, does not contain a statute of limitations provision. When Congress fails to provide a statute of limitations, federal courts borrow the most analogous state statute of limitations, provided that it is not inconsistent with underlying federal policies. *See County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 240 (1985).

The applicable implementing regulations for the IDEA related to this cause are 34 C.F.R. § 300.512(a)-(c).

STATEMENT OF THE CASE

A. Nature of case

In *C.M. v. The Board of Education of Henderson County*, 241 F.3d 374 (4th Cir. 2001), C.M. is a young girl, who at the approximate age of 2.5 years old, was diagnosed as suffering from autism. At that time her family lived in New Hampshire. After attempting an unsuccessful intervention for approximately one year, the family became aware of a program in North Carolina developed by the Division for the Treatment and Education of Autistic and Communication Handicapped Children ("TEACCH"). They moved to Henderson County, North Carolina. There, an Individual Education Program ("IEP") was developed and CM was enrolled in a TEACCH based program with the defendant school district. The child attended that program for slightly over three months pursuant to an IEP.

In addition to the IEP, the parents arranged for services at a local TEACCH facility in the nearby city of Asheville, NC. When those programs failed to produce any significant improvement or progress, Plaintiffs withdrew their daughter from Defendant's school and the TEACCH facility.

They then established an intensive private program developed by Dr. O. Ivar Lovaas, consisting of approximately forty hours of one-on-one therapy per week, fifty weeks a year. Having tested that private program for approximately nine months and established exceptional success, in December 1994, Plaintiffs sought to have the school district adopt and fund that program.

Their request sparked a series of 10 IEP meetings and 23 evaluations that took place from December 1994 until September of 1996. Disagreements over the evaluations and the IEPs resulted in two due process petitions which were consolidated. Through her Lovaas program, CM continued to make substantial, steady progress which was documented in her therapy logs, in standardized tests and through ever increasing complexity of each draft IEP developed.

In spite of her remarkable gains, the School District refused to consider CM's Lovaas program as a possible option. Instead, they insisted on designing a program that would allow for her placement into one of their existing TEACCH based facilities. In turn, the parents continually rejected the previously proven unsuccessful TEACCH program. However, the parties continued to meet and work on IEPs for CM.

As the parties reached impasse in their negotiations, the parents filed due process petitions. The Administrative Law Judge ("ALJ") and the State Review Officer ("SRO") found that CM's IEP should have included a provision for her Lovaas trained aide to help her to transition to the school's program. (App. p. 102 ¶95, p. 104-105 ¶12) Because their decisions were issued well beyond the maximum time lines allowed by the Act, (255 days beyond the close of evidence at the local level and 73 days beyond the filing of the appeal at the state level) CM was not able to take advantage of that provision of the decisions. These failures to meet the time constraints were excused by The District Court and the Fourth Circuit Court of Appeals.

In addition to excusing the failure to meet the maximum legislated time lines, the Fourth Circuit concluded the application of the 60 day statute of limitations found in North Carolina's Administrative Procedures Act for initiating Contested Case (Due Process) petitions, did not violate the underlying policy of the IDEA.

B. Course of Proceeding

In the C.M. case, disagreements among Plaintiffs and Defendants over the evaluations and the IEPs resulted in two due process petitions being filed. Those petitions were consolidated prior to the local level due process hearing below. Approximately two and a half weeks prior to the date the hearing was to begin (following the last continuance by consent), Defendants filed a motion seeking summary judgment on all issues based on the North Carolina sixty (60) day statute of limitations applicable to seeking relief under the North Carolina Administrative Procedures Act.

The ALJ granted Defendant's motion for the 1995/96 and all prior years. That partial summary judgment was affirmed by the SRO and the District Court Judge ("DCJ").

In *M.E. v. Buncombe County Board of Ed.*, 241 F.3d 374 (4th Cir. 2001) case, the ALJ granted the school district's motion for summary judgment on the second day of the due process evidentiary hearing, and dismissed the case. That decision was affirmed by the SRO and the District Court Judge.

At the Fourth Circuit, the cases were consolidated. The Department of Justice filed an Amicus Brief in the *M.E.* case opposing the 60 day limitations period. The Attorney General for the State of North Carolina was allowed to intervene on behalf of the Defendant in the *M.E.* case to argue for the enforcement of the 60 day limitations period.

In its decision, the Fourth Circuit Court of Appeals adopted the 60 day statute of limitations found in North Carolina's Administrative Procedures Act for initiating Due Process petitions, concluding it did not violate the underlying policy of the IDEA because it contained a notice provision. The Fourth Circuit reversed the DCJ decisions dismissing the cases based on the 60 day statute of limitations, concluding the school district had not provided Plaintiffs with proper notice that the limitations period had begun to run and remanded the case for further proceedings.

C. Disposition of Courts Below

In the *C.M.* case, on October 12, 1999 the District Court Judge entered final judgment against Plaintiffs and adopting the 60 day statute of limitations found in North Carolina's Administrative Procedures Act for initiating Due Process petitions, concluding it did not violate the underlying policy of the IDEA. In the *M.E.* case, on December 17, 1999 the District Court Judge entered final summary judgment against Plaintiffs also applying the 60 day statute of limitations.

The Fourth Circuit Court of Appeals affirmed his decisions to adopt the 60 day statute of limitations found in North Carolina's Administrative Procedures Act for initiating Due Process petitions. It concluded that limitations period did not violate the underlying policy of the IDEA because it contained a notice provision. The Fourth Circuit then reversed the District Court decisions concluding the school district had not provided Plaintiffs with proper notice that the limitations period had begun to run and remanded the case for further proceedings.

REASONS FOR GRANTING THE WRIT

The United State Court of Appeals for The Fourth Circuit has entered a decision in this cause that is in conflict with the decision of the Eighth Circuit Court of Appeals. In doing that it has decided an important federal question in a way that conflicts with relevant decisions of this Court.

No policy consideration can justify denying a handicapped child services under the guise of prompt resolution. In rejecting similar arguments regarding a 30-day statute of limitations found in the Arkansas Administrative Procedure Act the Eighth Circuit Court of Appeals in the case of *Birmingham v. Omahas School Dist*, 220 F.3d 850 (8th Cir. 2000) concluded:

> . . . Contrary to the district court's conclusion, the AAPA is not closely analogous to the IDEA. . . *Id.* at 854.
>
> Because the standard of review, scope of review and evidence considered differ significantly under the IDEA and AAPA, the statutes are not closely analogous. Even if they were, however, the district court erred by borrowing the AAPA's thirty-day statute of limitations because it violates IDEA policies.
>
> **The IDEA mandates** that all disabled children have the opportunity to receive a free appropriate public education, and **that the child's rights and those of his/her parents are protected.** See 20 U.S.C. § 1400(d)(1)(B). **The IDEA also encourages parents and school officials to resolve disputes over the disabled child's education**, so that the child is not needlessly deprived of the education mandated by law. *See Murphy v. Timberlane Reg'l Sch. Dist.*,22 F.3d 1186, 1193-94 (1st Cir. 1994).

> Both of these policies are violated by a thirty-day statute of limitations. **Thirty days does not allow parents sufficient time to work with school officials to resolve educational disputes. Useful discourse that may resolve such disputes is foreclosed because parents are forced to immediately litigate.** The period also does not consider the scope of review in an IDEA case. Although thirty days may be long enough for an AAPA action, where review is limited to the record, it is insufficient for an IDEA claim because review is de novo and may expand beyond the record.
>
> **On a practical note, the truncated limitations period does not take into account the realities of raising a disabled child. Disabled children can require considerable parental attention, which leaves parents limited time to prepare a lawsuit. Borrowing a thirty-day limitations period would prevent many parents from bringing valid IDEA claims, simply because of their child's disability--an effect abhorrent to the IDEA.** (Emphasis added) *Birmingham,* at 855.

It is submitted these policy considerations would not be affected by a 60 day statute rather than a 30 day statute as the Court looking at alternative statutes of limitations, settled on the 3 year limitations period for personal injury actions concluding it "does not violate IDEA policies. A three year statute of limitations encourages parents to work with school officials to resolve disputes over the disabled child's education." *Birmingham,* at 856

Previously, the Fourth Circuit seemed to recognize these policy considerations. In *Schimmel v. Spillane*, 819 F.2d 477 (4th Cir. 1987), the Fourth Circuit undertook a thorough and detailed discussion of the policy issues which cause the application of a short 30-60 day limitations period to be inappropriate for IDEA cases. *Schimmel*, is not directly on point because it dealt with a parent's failure to file a notice of appeal within the sixty day appeal period after receiving an adverse decision following a state level review of a due process hearing. The case at bar deals with the filing of an initial due process petition following IEP meetings.

It is significant that the Schimmels received two hearings on the merits before being barred by the statute of limitations. The harshness of prohibiting a hearing on the merits under the guise of pursuing speedy resolution is unconscionable. Proceedings within the Administrative Process are supposed to progress in a less formal manner so they can be accomplished without the need for an attorney. Thus, all of the policy considerations noted in *Birmingham, supra* and *Schimmel* for not imposing a short thirty or sixty day statute of limitations for appeals from administrative hearings become even more compelling relative to the filing of the initial petition.

In considering the sixty day limitations in relation to the Education of Handicapped children Act ("EHA"), The *Schimmel* Court wrote:

> . . . In our view, however, the district court was correct in refusing to apply this statute of limitations to bar the Schimmel's suit, because **application of this very short limitations period would conflict with the federal policies underlying the EHA.** *Schimmel supra* at 482 (Emphasis added.)

. . . In addition to our concern that unrepresented parties not be unfairly penalized by a very short limitations period for filing suit, we note that other courts have identified other policies underlying the EHA that could be frustrated by application of a short statute of limitations. *See, e.g., Janzen*, 790 F.2d at 487-88 **(application of sixty-day limitations period would effectively restrict independent review Congress intended courts to have; would inhibit collection of evidence necessary to orderly review; and would undermine EHA's policy of encouraging parents to participate in decisions affecting placement of handicapped children)**; *Scokin*, 723 F.2d at 437 (thirty-day statute of limitations would frustrate EHA's goal of encouraging parental involvement and could result in inappropriate placement of handicapped children, contrary to policies of EHA); *Tokarcik*, 665 F.2d at 451-53 **(thirty-day limitations period would frustrate "statutory policy of cooperative parental and school involvement in placement determinations"; could lead to inappropriate placement decisions; and would limit the independent review courts are intended to exercise under the EHA)**. These additional concerns bolster our conclusion that application of the very short limitations period of the Virginia Administrative Process Act would be inappropriate in this case. *Schimmel*, *supra* at 482-483. (Emphasis added.)

The school system argues that application of the statute of limitations specified in Va. Sup. Ct. R. 2A:2 and 2A:4

> **would actually advance the federal policies underlying the EHA, in that it would ensure speedy resolution of disputes concerning appropriate education for handicapped children.** Undoubtedly, one important policy of the EHA is to encourage the prompt resolution of disagreements about the education of handicapped children so that such children will not be harmed by long delays before being placed in appropriate educational settings. *See* 121 Cong. Rec. 37416 (1975) (remarks of Senator Williams). **We are unwilling, however, to say that this interest in prompt resolution takes precedence over the other federal policies we have identified that could be undermined by application of a very short limitations period. In our view, the need for speedy resolution of disputes does not outweigh the risk that a very short statute of limitations may deny parties a fair opportunity to obtain judicial review** of adverse decisions rendered in administrative due process proceedings. **Furthermore, we believe that the natural desire of parents to secure an appropriate education for their children will motivate parents to seek such judicial review promptly.** Other courts have agreed. . . . *See, e.g., Janzen*, 790 F.2d at 488; *Scokin*, 723 F.2d at 437. *Schimmel supra* at 483. (Emphasis added.)

The *Schimmel* Court's footnotes are also instructive on the issue of the inappropriateness of applying a short 30 or 60 day statute of limitations.

[3] **We note that the Schimmels were represented by counsel at all stages of their administrative due process hearings.** The EHA provides that parties to such hearings have "the right to be accompanied and advised by counsel. . . ." 20 U.S.C. Sec. 1415 (d)(1). (Emphasis added)

[4] The **school system argues** that application of the two-tiered limitations period set forth in Va. Sup. Ct. R. 2A:2 and 2A:4 **would give parties a period of 60 days** within which to file suit following an adverse decision rendered in a due process hearing. We note that at least one district court has specifically considered this argument and rejected it. *See Kirchgessner* 632 F. Supp. at 620 and n.3. In any event, **we are not convinced that application of a 60-day limitations period would so far ameliorate the problems of unrepresented parties as to obviate the concerns expressed in this opinion.** *Schimmel, supra* at 482 (Emphasis added)

In the case *Shook v. Gaston County Bd. Of Edu.*, 882 F.2d 119 @121 (4th Cir. 1989), the Fourth Circuit had previously held:

> The three-year statute of limitations in North Carolina within which to bring a reimbursement suit based on the E.H.A. is found under N.C.G.S. § 1-52(2). However, as the district court properly found in this case, that statute was tolled by Karen's infancy and incompetency pursuant to N.C.G.S. § 1-17(a). *Shook*, at 121.

N.C.Gen.Stat. § 1-52 provides:

> § 1-52. Three years
>
> Within three years an action--
>
> (2) Upon a **liability created by statute**, either state or **federal**, unless some other time is mentioned in the statute creating it. (Emphasis added)

Petitioners contend this is the proper statute to be applied in IDEA cases because the IDEA is a Federal statute that contains no statute of limitations.

Prior to the *C.M.* case, the Fourth Circuit had also recognized the policy consideration of encouraging negotiation rather than the filing of a law suit. In *Cf. Combs v. School Board of Rockingham County*, 15 F.3d 357, 364 (4th Cir. 1994), The Court discussed the adverse affect that might result if it encouraged potential litigants and their attorneys to pursue legal claims prior to attempting simpler resolution of problems under the careful construct of the IDEA. In denying attorneys fees to the petitioner in *Combs, supra*, the Court suggested: ". . .School Boards must be given adequate notice of problems if they are to remedy them, and **must be given sufficient time to respond to those problems** before they can be held liable for failure to act." *Id.* at 363-364. There is no reason to believe that families are in any less need of time to respond to problems than school boards. How can families be expected to give adequate notice to school boards if the families are not even given adequate time to consider an IEP prior to losing the right to contest it in a due process hearing? The simple answer is they cannot.

It is also significant that the Office of Special Education Programs ("OSEP") has also twice ruled that a 60 day statute of limitations is unenforceable under the IDEA. *Raskin, Letter to*, 17 EHLR 1116 (OSEP February 25, 1991);

Pawlisch, Letter to, 29 IDELR 1088 (OSEP October 22, 1997).

In its decision in *C.M.* and *M.E.*, the Fourth Circuit attempted to distinguish *Birmingham*, because the Arkansas APA does not contain a notice provision. The entire linchpin for the Fourth Circuit's decision turns on the notice provision. However, the notice provision does not impact any of the policy considerations cited by the *Birmingham* court or the *Schimmel* court. In fact, with the great majority of IEPs being completed in April or May for the following August or September school term, unless the family preserved its rights by filing a due process petition, the statute of limitations will have expired before the child has an opportunity to try the proposed program.

The *C.M.* Court wrote:

> . . . Accordingly, although we recognize that in *Schimmel* we concluded that policies embodied in the IDEA required that we reject a short limitations period, we believe a different result is required here. Principally because the statute at issue here, unlike that in *Schimmel*, contains an express requirement of clear and unambiguous notice of the agency action and of the commencement and time of the limitations period, and also because, again unlike *Schimmel*, the state expressly designated that this abbreviated limitations period govern IDEA administrative proceedings, we conclude that adoption of this 60-day limitations period is not inconsistent with federal policies animating the IDEA. (App. 22)

The 60-day period applies generally to matters filed under North Carolina's Administrative Procedure Act. Thus, whether this were an Alcoholic Beverage Commission case

or Department of Natural Resources case, the same abbreviated limitations period would apply. Contrary to the Court's conclusion, this was not a limitations period specifically established for IDEA cases.

The *C.M.* Court also wrote:

> . . . A school system cannot make parents "notice-proof" simply by periodically distributing publications containing the law setting forth the "right, procedure, and time limit" of a request for a due process hearing. *See generally Canada Life Assurance Co. v. Lebowitz,* 185 F.3d 231 (4th Cir. 1999). *C.M., supra* at 388.

By adopting the sixty day statute of limitations, the Fourth Circuit has effectively made this seemingly all important notice provision meaningless. It also converted the short time limitations that Congress established to help disabled children into a weapon that school districts will now use to deny them access to the judicial process for valid claims.

In *C.M.*, the proper application of the short time limitations established by Congress would have resulted in a decision in favor of C.M. because of the failure to meet the 45 day and 30 day limitations found in 34 C.F.R. § 300.512(a) & (b).

Contrary to the holdings in both *Hendrick Hudson District Board of Education v. Rowley*, 458 U.S. 176, (1982) and *Hall v. Vance County Bd. of Educ.*, 774 F.2d 629 (4th Cir. 1985), the courts below overlooked the importance of the complying with this all important procedural safeguard. Rather than issuing the decision within the requisite 45 days from the filing of the due process petition, the local level due process decision was issued December 11, 1997, some 534 days after the Initial Petition for Contested Case Hearing was filed, 405 days after the Second Petition for Contested Case

Hearing was filed, 283 days after the last consented to continuance, 269 days after the last continuance granted pursuant to a motion by Defendant and 255 days after the evidentiary hearing was concluded (April 16, 1997) (Dist. Court Decision App. 60). The State Review Officer more than doubled the maximum 30 days allowed for his decision. His was issued in 73 days. (Dist. Court Decision App. 60)

Because the decisions were issued so far beyond the requisite deadlines, C.M. was not able to take advantage of the requirement to have a Lovaas trained aide assist in her transition to the school's program. (ALJ Decision App. 102 ¶95 and 104-105 ¶12)

CONCLUSION

For the above reasons, it is respectfully requested that the Petition for Writ of Certiorari be granted to resolve the conflict among the Circuit Courts of Appeal and to correct the misapplication of the unconscionably short statute of limitations which clearly undermines the underlying policy of the IDEA and properly apply the time limitations imposed by Congress.

Respectfully submitted, this the 22nd day of May, 2001.

THE LAW FIRM OF
PAUL L. ERICKSON, P.A.

PAUL L. ERICKSON
Attorney for C.M.
Counsel of Record
1998 Hendersonville Road,
Building 1, Suite 3
Asheville, NC 28803-2192
(828) 684-7883

TABLE OF CONTENTS
Appendix to Petition

Page No.

Opinion,
United States Court of Appeals
for the Fourth Circuit
entered February 21, 2001 ..... App. 1

Memorandum of Decision of
The Honorable Lacy H. Thornburg
entered October 12, 1999 ..... App. 30

Decision of
The Honorable Meg Scott Phipps
entered December 11, 1997 ..... App. 71

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 99-2533

CM, a minor, by and through her parents, JM and EM, and on their own behalf,

Plaintiffs-Appellants,

v.

THE BOARD OF EDUCATION OF HENDERSON COUNTY, a/k/a Henderson County Public Schools; DAN G. LUNSFORD, Education Department Superintendent; LINDA R. HAWK, Chairman; JACKIE H. HORNSBY, Vice Chairman; ERVIN W. BAZZLE; BRENDA O. BROCK; ALLEN A. COMBS; THOMAS E. ORR; THOMAS B. PRYOR; JUDY DIANE HARTMAN COOK, in their official and individual capacities,

Defendants-Appellees,

STATE OF NORTH CAROLINA,

Intervenor.

No. 00-1101

M.E.; P.E., on their behalf and on behalf of their son, C.E.,

Plaintiffs-Appellants,

v.

THE BUNCOMBE COUNTY BOARD OF EDUCATION, a/k/a Buncombe County Public Schools,

Defendant-Appellee,

and

STATE OF NORTH CAROLINA,

Intervenor.

UNITED STATES OF AMERICA; NORTH CAROLINA SCHOOL BOARDS ASSOCIATION,

Amici Curiae.

Appeals from the United States District Court
for the Western District of North Carolina, at Asheville.
Lacy H. Thornburg, District Judge.
(CA-98-66-1, CA-99-3)

Argued: December 4, 2000
Decided: February 21, 2001
Entered: February 21, 2001

Before WIDENER and MOTZ, Circuit Judges, and Terrence W. BOYLE, Chief United States District Judge for the Eastern District of North Carolina, sitting by designation.

Affirmed in part and reversed and remanded in part by published opinion. Judge Motz wrote the opinion, in which Judge Widener and Chief Judge Boyle joined.

COUNSEL

ARGUED: Paul Lawrence Erickson, THE LAW FIRM OF PAUL L. ERICKSON, Asheville, North Carolina; Peter W.D. Wright, Deltaville, Virginia, for Appellants. Kevin Kendrick Russell, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Amicus Curiae United States. Ann L. Majestic, THARRINGTON SMITH, L.L.P., Raleigh, North Carolina; Christopher Zemp Campbell, ROBERTS & STEVENS, P.A., Asheville, North Carolina, for Appellees. Joyce S. Rutledge, Assistant Attorney General, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina, for Intervenor. **ON BRIEF:** Michael F. Easley, Attorney General of North Carolina, Thomas J. Ziko, Special Deputy Attorney General, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina, for Intervenor. Bill Lann Lee, Acting Assistant Attorney General, Mark L. Gross, Rebecca K. Troth, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C.; Judith A. Winston, General Counsel, Kala Shah Surprenant, UNITED STATES DEPARTMENT OF EDUCATION, Washington, D.C., for Amicus Curiae United States. Elaine M. Whitford, THARRINGTON SMITH, L.L.P., Raleigh, North Carolina; Allison B. Schafer, NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, Raleigh, North Carolina, for Amicus Curiae Association.

OPINION

DIANA GRIBBON MOTZ, Circuit Judge:

We consider today, as a matter of first impression, whether a state statute, providing that a request for a due process hearing must be filed within sixty days of an agency decision, is inconsistent with the Individuals with Disabilities Education Act (IDEA). We conclude that as long as a party seeking such a hearing is supplied with the required statutory notice, this limitations period does not conflict with federal policies embodied in the IDEA.

I.

Both cases before us involve requests for IDEA services on behalf of autistic children. The North Carolina public school system has developed a nationally recognized program for educating autistic children known as the TEACCH program. But the parents of both children involved in these cases concluded that the Lovaas program, a rival method for the education of autistic children, offered their children more hope for a normal life. Accordingly, the parents placed their children in Lovaas therapy. When the parents asked school officials to reimburse them for the cost of the Lovaas program under the IDEA, those officials refused. Both sets of parents continued to negotiate for a time with school administrators, and then filed petitions for due process hearings. State administrative law judges (ALJs) dismissed all or most of the claims in these petitions as untimely.

We first briefly outline the statutory scheme at issue here and then the specific relevant facts of the two cases before us.

A.

The IDEA creates a federal grant program to assist state and local agencies in educating disabled children. See 20 U.S.C. § 1412 (1994 & Supp. IV 1998). To receive funds under the IDEA, states must provide disabled children with the opportunity to receive a "free appropriate public education," § 20 U.S.C. § 1412(a)(1), by providing special education and related services in an "individualized education program" (IEP). 20 U.S.C. § 1412(a)(4). "[T]o ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of free appropriate public education," the IDEA requires states to establish and follow certain procedures. 20 U.S.C. § 1415(a). Among these is the requirement that, if parents of a disabled child and an educational agency disagree as to the appropriateness of an IEP or a question of financial responsibility, parents have the right to resolve the matter at an "impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency." 20 U.S.C. § 1415(f).

North Carolina has implemented the IDEA in N.C. Gen. Stat. § 115C-111, et seq. (1999). In this statute, as instructed by the IDEA, North Carolina has provided parents the right to an impartial due process hearing, which is referred to in state law as a "[r]ight of [r]eview" at a "contested case" hearing. N.C. Gen. Stat. § 115C-116(c); N.C. Gen. Stat. § 150B-23.

The IDEA itself imposes no time limit on the period in which parents may request a due process hearing. The chapter of the North Carolina code implementing the IDEA, however, directs that "[e]xcept as otherwise provided in this section, the administrative review shall be initiated and conducted in accordance with Article 3 of Chapter 150B of the General Statutes, the Administrative Procedure Act [APA]." N.C. Gen. Stat. § 115C-116(d).

The North Carolina APA, in turn, provides that "a contested case shall be commenced by filing a petition." N.C. Gen. Stat. § 150B-23(a). It further provides:

> Unless another statute or a federal statute or regulation sets a time limitation for the filing of a petition in contested cases against a specified agency, the general limitation for the filing of a petition in a contested case is 60 days. The time limitation, whether established by another statute, federal statute, or federal regulation, or this section, shall commence when notice is given of the agency decision to all persons aggrieved who are known to the agency by personal delivery or by the placing of the notice in an official depository of the Unites States Postal Service wrapped in a wrapper addressed to the person at the latest address given by the person to the agency. The notice shall be in writing, and shall set forth the agency action, and shall inform the persons of the right, the procedure, and the time limit to file a contested case petition. When no informal settlement request has been received by the agency prior to issuance of the notice, any subsequent informal settlement request shall not suspend the time limitation for the filing of a petition for a contested case hearing.

Id. § 150B-23(f) (emphasis added).

B.

In M.E., the family moved to North Carolina from Maryland in August 1995, after C.E. had been diagnosed as autistic at a TEACCH center in North Carolina. When the family arrived in North Carolina, C.E.'s parents initially placed C.E. in a Lovaas program. Pleased with C.E.'s

progress, in March 1996 his parents contacted the Buncombe County school authorities seeking funding for the Lovaas program under the IDEA. Extensive negotiations followed, including several meetings, letters, and the preparation of a draft IEP. C.E.'s parents repeatedly rejected any proposed placement of C.E. other than in the Lovaas program.

In June 1997, the parents decided that C.E. had substantially recovered because of the Lovaas therapy and wished him placed in regular public school classes. In that same month, C.E. was medically reevaluated and school officials agreed with the parents that C.E. was no longer disabled.

In July 1997, the parents again requested funding for C.E.'s past participation in the Lovaas program. The parents and attorneys for the Buncombe County Board of Education exchanged letters in August 1997 discussing "settlement" of this claim. In neither the August letters, nor in any prior or subsequent correspondence, did the Board state that it was providing written notice of its final decision to deny all but nominal reimbursement for the Lovaas program or that the applicable limitations period for filing a petition for a due process hearing was sixty days from the date of that denial. The Board did forward with one of the August letters a copy of the current IDEA notice and attorneys' fees provisions, as well as recently amended North Carolina "mediation provisions."

In April 1998, the parents filed a petition for a due process hearing, seeking reimbursement for C.E.'s Lovaas therapy. A state ALJ found that one of the Board's August 1997 "settlement" letters was "final rejection" of the parents' reimbursement claim, and that their petition had been filed 257 days after the August letter, on April 22, 1998. The ALJ concluded that the Board provided the parents "with the requisite notice pursuant to § 150B-23." Accordingly, the ALJ held that the parents' petition was

untimely. A state review officer affirmed this decision. The parents then filed a complaint in the district court, which granted summary judgment to the Board, reasoning that the ALJ had correctly ruled that the 60-day limitations period barred the claim.

The facts of CM are similar to those in M.E. CM was diagnosed with autism at age two and her parents brought her from New Hampshire to North Carolina to take advantage of the TEACCH program. In 1993, CM began the TEACCH program, where she made educational progress. However, after learning of Lovaas therapy, CM's parents removed her from TEACCH and enrolled her in the Lovaas program.

In December 1994, CM's parents asked Henderson County school authorities to fund her participation in the Lovaas program under the IDEA. After a series of meetings, school officials proposed an IEP - for the 1995-1996 school year, which placed CM in a full day program with TEACCH. This IEP was mailed to the parents on February 16, 1995, with an accompanying letter explaining why school officials believed that the IEP set forth an appropriate plan for CM. The February 16, 1995 letter also discussed the possibility of mediation, explaining that mediation "does not in any way limit or delay a formal due process hearing or other legal procedure." Finally, the letter noted that "[y]ou indicated that you have a copy of the Handbook of Parent's Rights, which outlines appeal options available" and forwarded another copy of the handbook to the parents. Again, neither in this letter nor in later communications did the school board state that it was providing written notice of its final decision to deny reimbursement for the Lovaas program or that the applicable 60-day limitations period for requesting a due process hearing had been triggered.

The parents responded by requesting first mediation and then a reevaluation of CM by outside consultants. Although the parents and school authorities exchanged

numerous letters, mediation never occurred; however, outside consultants did re-evaluate the child. As the previous IEP was about to expire, school officials began to prepare a new IEP for CM. After further negotiation and re-evaluation of CM, school officials and CM's parents participated in IEP meetings during August and September 1996 for the 1996-1997 school year. The 1996-1997 IEP again proposed placing CM in the TEACCH program, and the parents again objected, favoring the Lovaas program.

On November 1, 1996, the parents filed a petition for a due process hearing, seeking reimbursement for CM's participation in the Lovaas program for the 1993-1994, 1994-1995, and 1995-1996 school years and placement in Lovaas therapy in the 1996-1997 school year. That petition was consolidated with a petition that CM's parents had filed on June 25, 1996, seeking reimbursement for costs associated with obtaining outside evaluation of CM. On March 24, 1997, another state ALJ (not the ALJ that ruled in M.E.) found the parents' claims untimely and granted summary judgment to the Henderson County schools with respect to the reimbursement claims and assertion of IDEA violations in the 1993-1994, 1994-1995, and 1995-1996 school years. The ALJ reasoned that the parents' "rights to file a contested case expired 60 days after the February 16, 1995 correspondence." On December 11, 1997, after a multi-day hearing, still another ALJ entered a final order finding the 1996-1997 proposed IEP appropriate. On March 3, 1998, a state review officer affirmed all of these decisions.

The parents then filed a complaint in the district court seeking to recover on the claims rejected by the ALJs, asserting new IDEA claims for the 1997-1998 and 1998-1999 school years, and a host of other new contentions. Ultimately, the district court rejected all of the

parents' claims.[1] With respect to the 60-day limitations period, the court concluded that the ALJ had properly applied that limitations period to bar the parents' claims for the 1993-1994, 1994-1995, and 1995-1996 school years.

We consolidated M.E. and CM on appeal and permitted the State of North Carolina to intervene as an appellee, urging affirmance. We also permitted the North Carolina School Boards Association to appear as an amicus, urging affirmance, and the United States to appear as an amicus, urging reversal. We appreciate the assistance of the intervenor and amici.

II.

Although the IDEA itself sets no limit on the time in which parents may request a due process hearing, no party before us (nor any amici) maintains that parents have an unlimited period in which to request such a hearing. Rather, all agree that the most appropriate limitations period should be borrowed from state law and that borrowed period should control the time allowed to request an IDEA due process hearing.

When Congress fails to provide a statute of limitations, federal courts borrow the most analogous state statute of limitations, provided that it is not inconsistent with underlying federal policies. See County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 240 (1985). Therefore,

---

[1] In addition to arguments related to the limitations issue, CM raises other contentions on appeal including claims based on asserted procedural violations during the administrative process and a claim for reimbursement for the 1996-97 school year. We have considered all of these contentions and have concluded that the district judge properly rejected them. Accordingly, we affirm those portions of the judgment on the reasoning of the district judge. We also reject as meritless CM's contentions that asserted procedural irregularities in the district court require reversal.

we must first evaluate which North Carolina statute of limitations constitutes the most analogous limitations period. Next we must decide whether that period is in any way inconsistent with the federal policies contained in the IDEA.[2] The school board, the State of North Carolina, and their amicus contend that the most appropriate limitations period for an initial request for an IDEA due process hearing in North Carolina is 60 days and that this period should, therefore, be borrowed. They rely on N.C. Gen. Stat. § 115-116(d), which directs that initiation of administrative due process hearings in special education

---

[2] The limitations period we consider today governs only state administrative hearings, access to which is traditionally governed by the states. It does not establish the period for filing an IDEA action in federal court. Indeed, the limitations period in question governs special education proceedings in a state tribunal that necessarily commence and conclude before a federal cause of action ever arises. See Kirkpatrick v. Lenior County Bd. of Educ., 216 F.3d 380, 387 (4th Cir. 2000) (IDEA cases in federal court are not "appeals" from state agency decisions, but rather original actions filed in district court). Because Congress arguably left the creation of a limitations period for requesting a state administrative hearing to the states, one might contend that "borrowing" is unnecessary here. However, we implicitly rejected this view in Manning v. Fairfax Co. Sch. Bd., 176 F.3d 235 (4th Cir. 1999), when we held, in a case from Virginia, that the borrowing analysis was the appropriate method of determining the limitations period for filing requests for IDEA administrative due process hearings. Moreover, the parents, the State of North Carolina, the United States, and the only two other circuits to have considered the question have all employed the borrowing analysis in this situation. See Strawn v. Missouri State Bd. of Educ., 210 F.3d 954 (8th Cir. 2000); Murphy v. Timberlane Reg'l Sch. Dist., 22 F.3d 1186 (1st Cir. 1994). Accordingly, we apply that analysis here. We note, however, that even if the choice of a limitations period was regarded as a matter left to the states, a federal court would still have to determine that a state's choice of limitations period did not conflict with the federal policies animating the IDEA. We believe that analysis would involve many of the same considerations discussed above and would lead to the same conclusion we reach here.

cases be conducted in accordance with the state administrative procedure act, which, in turn, provides 60-day limitations period. See N.C. Gen. Stat. § 150B-23(f).

The parents and their amicus, the United States, assert that borrowing this short limitations period would be "inconsistent with the IDEA's purposes because it ensures that many legitimate claims will be forfeited through inadvertence or inability to locate representation in such a short time, rendering ineffective the protections Congress created for children with disabilities." Brief of United States at 20. Furthermore, they maintain that such a short period would "interfere with attempts by the parents and school to seek an amicable resolution short of litigation by forcing administrative review almost immediately upon completion of the IEP process." Id. They suggest that North Carolina's catch-all three-year statute of limitations for statutory actions for which no limitations period is otherwise provided, see N.C. Gen. Stat. § 1-52(2), constitutes a better borrowing choice.

Logic virtually compels the conclusion that a state special education statute, specifically enacted to comply with the IDEA, like N.C. Gen. Stat. § 115C-116, constitutes the state statute most analogous to the IDEA. Accordingly, when a state legislature incorporates into its own special education statute a limitations period, as the North Carolina legislature has here, that period almost certainly constitutes the state limitations period for IDEA purposes. See generally Schimmel v. Spillane, 819 F.2d 477, 481 (4th Cir. 1987); see also Cleveland Heights-Univ. Heights Sch. Dist. v. Boss, 144 F.3d 391, 397 (6th Cir. 1998); Dell v. Board of Educ., 32 F.3d 1053, 1060 (7th Cir. 1994). Thus, we hold the 60-day limitations period in § 150B-23 is the period

associated with the state statute, § 115C-116, most analogous to the IDEA.[3]

Whether that 60-day statute of limitations is inconsistent with federal policies animating the IDEA, however, presents a more difficult question. To resolve it, we must first ascertain what policies Congress intended to further in the IDEA. Congress enacted the IDEA "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs." 20 U.S.C. § 1400(d).

To achieve that purpose, the Act embodies a federal policy that IDEA disputes should be resolved quickly to ensure that disabled children receive their statutorily guaranteed free appropriate public education while they can most benefit from it. The Act's requirement of yearly placement reassessment, 20 U.S.C. § 1414(d)(4), demonstrates Congress's understanding that children develop quickly, and that once-correct placement decisions can soon become outdated. If a limitations period is too long, remedies may be delayed by months or years of litigation and become anachronistic before ever being implemented. The Act's intent would obviously be thwarted if placement decisions were not carried out until after a

---

[3] We recognize that Shook v. Gaston County Bd. of Educ., 882 F.2d 119 (4th Cir. 1989), involves a limitations period in an IDEA case from North Carolina. That case, however, concerned a statute of limitations for filing an IDEA action in federal court, rather than statute of limitations for an administrative claim. Moreover, in Shook, the sole question was whether a disabled adult could bring an action to obtain reimbursement for special education services incurred while she was a minor. We held she could. In doing so, we assumed, and no party argued to the contrary, that North Carolina's three year catch-all statute of limitations, N. C. Gen. Stat. § 1-52(2), applied, and we concluded that this statute had been tolled while the plaintiff was a minor. Because we had no occasion to consider § 150B-23(f) or even engage in the borrowing analysis, Shook with its vastly different focus provides no authority for application of § 1-52(2) rather than § 150B-23(f) in the case at hand.

child could benefit from those placements. Senator Williams, the IDEA's principal author, recognized this in the final Senate debate, stating that "I cannot emphasize enough that delay in resolving matters regarding the education program of a handicapped child is extremely detrimental to his development." 121 Cong. Rec. 37,416 (1975).

An equally important IDEA policy is to encourage parents to participate in the education of their disabled children and to provide them with the procedural tools to enforce the mandate of the Act. Indeed, the Supreme Court has specifically recognized the centrality of this federal policy:

> It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process . . . as it did upon the measurement of the resulting IEP against a substantive standard.

Board of Educ. v. Rowley, 458 U.S. 176, 205-206 (1982).

Thus, the IDEA requires that schools collaborate with parents in developing IEPs, 20 U.S.C. § 1414(d)(1)(B), directs states to provide a due process hearing for parents who disagree with school authorities' decisions involving their child's education, 20 U.S.C. § 1415(f), and establishes a parental right to file an action in federal court if dissatisfied with the result of that due process hearing, 20 U.S.C. § 1415(i)(2). An unduly short limitations period might eliminate the intended collaborative nature of the IDEA; parties will not continue to negotiate if parents are forced too quickly to initiate a due process hearing to preserve their rights. Moreover, to

take advantage of their right to a due process hearing and judicial review, parents must have sufficient time to understand any adverse decision by school authorities, evaluate any IDEA claim arising from an adverse decision, hire an attorney if necessary, and then proceed to challenge the adverse decision. Congress did not establish procedural rights as impediments to IDEA claims or as a means to foreclose parental involvement in their children's education. Rather, these rights were created to supply a simple and efficient method to encourage parental participation and facilitate parental enforcement of the IDEA.

So important did Congress find this policy that it specifically directed school officials to provide parents of disabled children with all necessary information regarding the procedures guaranteed by the Act so that parents could take advantage of its protections. For example, the IDEA requires school authorities to supply detailed written notice whenever they propose or refuse to initiate or change the identification, evaluation, or placement of a child. See 20 U.S.C. §§ 1415(b)(3) and (c). The Act also mandates that at several distinct phases of negotiations between parents and school officials, school officials must provide parents with a procedural safeguard notice. See 20 U.S.C. § 1415(d). Again, the notice must be detailed and, among other things, must contain information about the right to a due process hearing. See 20 U.S.C. § 1415(d)(2). The policy behind these detailed notice requirements is obvious. Congress wanted to eliminate the possibility that disabled children would lose their right to benefits or that parents would forfeit their role in their children's education because of ignorance of the Act and its procedural safeguards; hence, Congress placed the onus upon school authorities to inform parents of their IDEA rights.

In the context of original judicial IDEA actions (sometimes inaccurately described as "appeals" from state administrative due process hearings, see Kirkpatrick v. Lenoir Co. Bd. of Educ., 216 F.3d 380, 385 (4th Cir.

2000)), federal courts have struggled to accommodate these competing policies. Some have upheld short limitations periods as consistent with the policy of "speedy resolution of IDEA-related disputes" and simply ignored the question of whether such short periods improperly interfere with parental involvement and procedural rights. See, e.g., Boss, 144 F.3d at 397 & n.6 (adopting 45-day limitations period); Adler v. Educ. Dept. of New York, 760 F.2d 454, 459-60 (2d Cir. 1985) (adopting 4-month limitations period). Other courts have found short limitations periods fundamentally inconsistent with the IDEA's policy of "parental participation in decision making procedures" and its panoply of guaranteed procedural rights, and so have rejected such periods without much consideration of the countervailing policy of quick resolution of IDEA disputes. See, e.g., Birmingham v. Omaha Sch. Dist., 220 F.2d 850, 855 (8th Cir. 2000); Scokin v. Texas, 723 F.2d 432, 436-37 (5th Cir. 1984); Tokarcik v. Forest Hills Sch. Dist., 665 F.2d 443, 451-53 (3d Cir. 1981).

The better-reasoned cases have attempted to take account of all relevant federal policies. They have upheld a short limitations period only when satisfied that it was accompanied by features that could "significantly mitigate" infringement on procedural rights and parental participation; most notably, these courts have found a requirement in the IDEA that school authorities provide "clear notice" of the relevant limitations period. See, e.g., Spiegler v. District of Columbia, 866 F.2d 461, 467 (D.C. Cir. 1989). See also Amann v. Town of Stow, 991 F.2d 929, 932 (1st Cir. 1993). If parents receive such notice and nonetheless fail to act within the allotted time, their claims are barred, see Amann, 991 F.2d at 933, but if parents do not receive this notice, school authorities cannot invoke limitations against them, see Spiegler, 866 F.2d at 467.

In Schimmel, we, too, attempted to balance the various federal policies embodied in the IDEA. 819 F.2d 477. We concluded that a "very short limitations period

would conflict with the federal policies," and instead Virginia's one-year catch-all statute of limitations best furthered these policies. Id. at 482. Our "most serious concern" with the suggested alternative 30-day limitations period was that parents unrepresented by counsel might be "unaware of" and so "unfairly penalized by a very short" limitations period. Id. Although we recognized that it had been held that the IDEA required that "educational agencies inform parents of the applicable limitations period," it was "not clear to us" that the IDEA "actually impose[d] such a duty on educational agencies." Id. Moreover, in Schimmel, the Virginia 30-day statute of limitations clearly contained no such obligation, and the defendant school board specifically contended that "it had no duty to inform the [parents] of the statute of limitations." Id. Given these facts, we held that the "one-year statute of limitations . . . str[uck] an appropriate balance between the need for speedy resolution of disputes and the need to ensure that the parties have a fair opportunity to obtain judicial review." Id. at 483. [4]

Recently, in Manning v. Fairfax Co. Sch. Bd., 176 F.3d 235 (4th Cir. 1999), we considered what limitations period applied to initiation of IDEA administrative due process hearings in Virginia. We were not asked to apply a short "30 to 60-day statute of limitations," id. at 239 n.3, but rather, were faced with a choice of no limitations period, a five-year limitations period, or the one-year catch-all period. Id. at 238. In this context, we followed Schimmel and borrowed the same general one-year catch-all limitations period borrowed in that case. We reasoned that "[t]here is nothing to persuade us that

---

[4] In Schimmel, we did not specifically resolve the question of whether the IDEA (in 20 U.S.C. § 1415(b)(1)(D)(1982) now recodified and expanded in § 1415(b)-(d)) requires educational agencies to inform parents of the applicable limitations period and we need not resolve that question in this case in view of the fact that N.C. Code § 150B-23(f) clearly does require this.

disputes in administrative IDEA proceedings are so different in nature from those in judicial IDEA actions as to justify application of disparate limitations periods." Id. at 239.[5] Moreover, we quoted with approval Schimmel's determination that the one-year limitations period struck an "appropriate balance" for the competing policies embodied in the IDEA, remarking that this period was "not so prohibitively short . . . that it undermine[d] the IDEA's policy of providing parents an opportunity to protect their disabled children's educational rights." Id.

Schimmel, Manning, and the out-of-circuit cases provide some helpful guidance in elaborating on the relevant policy concerns and appropriate balancing approach. Moreover, Schimmel establishes circuit precedent that a generally applicable, very short limitations period for IDEA actions in federal court, without any requirement that school authorities provide clear notice of

---

[5] In so commenting, we did not hold that the two contexts present identical issues. In fact, some factors suggest that a longer limitations period might be warranted in the administrative context. After all, a failure to meet the administrative limitations period forecloses not just a federal judge's second or third look at a question, but any review of it by an impartial decision-maker. See Murphy, 22 F.3d at 1192. Furthermore, at the administrative due process hearing, parents must formulate the issues, gather evidence, prepare witnesses, and create a record; arguably, this task requires more time than that needed to prepare for judicial review. On the other hand, other factors suggest that a longer limitations period is appropriate in the judicial context. Arguably, preparing a complaint initiating a federal lawsuit, which must meet the requirements of federal law, requires more time and expertise than filing an informal one-page administrative petition. Moreover, Congress's concern that IDEA disputes be quickly resolved seems to have focused on eliminating lengthy administrative proceedings, rather than on limiting the time for seeking judicial review. See Tokarcik, 665 F.2d at 454 n.20. In sum, somewhat different issues are involved in the two contexts but these point both ways and in Manning we concluded that these differences did not justify adoption of different limitations periods. Of course, in Manning we were not confronted with the situation in which a state legislature had specifically enacted different limitations periods in the administrative and judicial contexts.

the limitations period, is inconsistent with federal policies embodied in the IDEA. Although in Manning we were not confronted with an argument urging adoption of a very short limitations period, we certainly suggested that for similar reasons such an abbreviated limitations period for initiation of an IDEA administrative due process hearing would also conflict with these policies. See Manning, 176 F.3d at 239 and n.3 (relying on Schimmel's determination as to the proper balance of federal interests, holding that the one-year period was "not prohibitively short," and noting that school authorities did not claim that a 30 or 60-day limitations period applied). However, no case -- not Schimmel, not Manning, not any of the out-of-circuit precedent-- has considered the application of a statutory scheme like that encompassed in N.C. Gen. Stat. § 115-116(d) and § 150B-23(f) to requests for IDEA administrative due process hearings.[6]

Indeed, the North Carolina statutory scheme apparently differs in a fundamental respect from any statute previously considered by any court in any IDEA context. It contains an explicit requirement that school authorities clearly and fully notify parents of the limitations period. Under North Carolina law, the 60-day limitations period only commences "when notice is given of the agency decision to all persons aggrieved who are known to the agency." N.C. Gen. Stat. § 150B-23(f). Moreover, "[t]he notice shall be in writing, and shall set forth the agency

---

[6] The only other appellate opinions to have determined what limitations period applies to initial requests for IDEA due process hearings are no more apposite than Manning. See Strawn, 210 F.3d 954; Murphy, 22 F.3d 1186. Like Manning, neither involves a very short limitations period, or one requiring notice of its commencement. Rather, both Strawn and Murphy focus on determining whether a multi-year limitations period frustrated the federal policy that IDEA claims be quickly resolved. See Strawn, 210 F.3d at 957 (5-year limitations period is too long); Murphy, 22 F.3d at 1192-1194 (6-year limitations period not too long).

action, and shall inform the [aggrieved] persons of the right, the procedure, and the time limit to file a contested case petition." Id. (emphasis added). Thus, without clear and complete written notice that a final agency decision has been taken, that parents can contest the decision by filing a petition for a due process hearing, and that such petitions must be filed within 60 days of the contested agency decision, § 150B-23(f)'s abbreviated limitations period is never triggered. Not only do the school authorities concede that the statute so directs, see, e.g., Brief of Appellee Buncombe County Bd. of Educ. at 17 ("Section 150B-23(f) only applies to cases where a school system triggers the provision by providing written notice of the limitations period and notice of the school system's decision"), but a review of North Carolina case law indicates that its courts would not countenance any departure from, or relaxation of, statutory requirements. See Clay v. Employment Sec. Comm'n , 457 S.E.2d 725, 727 (N.C. 1995) ("Statutes of limitations `should be not extended by construction.'"); Pearson v. Nationwide Mut. Ins. Co., 382 S.E.2d 745, 748 (N.C. 1989) (requiring strict compliance with statutory notice requirement); Williams v. Bowden, 494 S.E.2d 798, 800 (N.C. App. 1998) (same); Cameron & Barkley v. American Ins. Co., 434 S.E.2d 632, 637 (N.C. App. 1993) (notice must be in exact form specified in statute).

Does § 150B-23(f)'s notice requirement sufficiently accommodate the federal policies we found inconsistent with the short limitations period in Schimmel? Obviously, this clear and specific notice provision does much to further the IDEA's strong commitment to informing parents fully of their procedural rights. It goes hand in glove with the extensive notice provisions contained in the IDEA itself. See 20 U.S.C. §§ 1415(b)(3), (c), and (d). Moreover, the notice requirement in § 150B-23(f) ameliorates "[o]ur most serious concern" in Schimmel, i.e., that parents would be "unaware of" and thus "penalized by a very short" limitations period. Schimmel, 819 F.2d at 482.

On the other hand, this 60-day limitations period (although twice as long as that at issue in Schimmel) does not provide a vast amount of time for parents to exercise the right to a due process hearing. This abbreviated time period also may be in some tension with the IDEA's policy of encouraging parental collaboration in placement decisions involving their children. Therefore, although the notice provision in § 150B-23(f) goes a long way to alleviating the concerns we voiced in Schimmel, it is not clear that such a provision alone makes an otherwise too-short limitations period acceptable. Given the holdings in Schimmel and Manning, if the 60-day limitations period at issue here had not been specifically selected by the state legislature to apply to these actions, it would be a close question whether circuit precedent required us to find it contrary to the policies embodied in the IDEA.

But, unlike the statutes at issue in Schimmel or Manning, the North Carolina legislature has specifically mandated that the 60-day limitations period applies to IDEA disputes. Thus, N.C. Gen. Stat. § 115(c)-116(d), the portion of the North Carolina Code implementing the IDEA and establishing IDEA due process hearings, provides that "administrative review shall be initiated and conducted in accordance" with N.C. Gen. Stat. § 150B-23, which in turn sets forth the 60-day limitations period. Moreover, in doing so, North Carolina has acted in full accord with the congressional directive that states conduct administrative due process hearings "as determined by State law." 20 U.S.C. § 1415(f).

Manning and Schimmel did not implicate an attempt by a state to legislate a statute of limitations specifically for IDEA proceedings. When a state does do this, as North Carolina has, we believe a federal court should give the chosen state limitations period special deference when determining whether it conflicts with policies animating the

IDEA. See Boss, 144 F.3d at 397.[7] Accordingly, although we recognize that in Schimmel we concluded that policies embodied in the IDEA required that we reject a short limitations period, we believe a different result is required here. Principally because the statute at issue here, unlike that in Schimmel, contains an express requirement of clear and unambiguous notice of the agency action and of the commencement and time of the limitations period, and also because, again unlike Schimmel, the state expressly designated that this abbreviated limitations period govern IDEA administrative proceedings, we conclude that adoption of this 60-day limitations period is not inconsistent with federal policies animating the IDEA.

III.

The parents in each case before us contend that even if we should hold, as we now have, that the 60-day limitations period applies to requests for IDEA administrative due process hearings in North Carolina, it does not bar their claims because they did not receive the required notice of the limitations period. The school authorities, of course, argue to the contrary. In each case they rely on certain letters sent to the parents.

In M.E., the school system maintains that two letters sent to the parents in response to the parents' settlement demand meet the statutory requirements of § 150B-23(f). On July 29, 1997, C.E.'s father mailed to the school system's representative a long letter attempting to settle the parents' claims for reimbursement and threatening resort to a due process hearing if the school board did not provide

---

[7] Of course, if the choice the state has struck is totally inconsistent with the IDEA, a court must reject it. For example, a statute like that in Schimmel would still unacceptably conflict with federal policies even if it were part of a state special education statute specifically referencing the IDEA.

reimbursement within ten days. The school responded in letters dated August 7, 1997 and August 8, 1997. The first August letter states that the school system was inclined to make a counter-offer of "some portion of the expenses actually incurred," but notes that "[p]rior to making any offer, however, the Board of Education must be consulted and must approve the payment." The letter explains that school authorities hoped to obtain "settlement authority, if any, within the next week." It then notes the parents' ten-day threat and remarks that the parents "of course, have the right to file a due process petition at any time, however, the reality of school systems requires that the governing board be consulted and that process takes time." The letter encloses copies of the most current authorization of the IDEA and recent North Carolina legislation amending state IDEA mediation rules. The second letter is very short and simply makes a conditional counter-offer to settle the parents' claim for $6,000 pending "final approval by the Board."

In CM, school authorities rely upon a letter sent by the Director of Programs for Exceptional Children of the Henderson County Schools, to CM's parents on February 16, 1995. The letter accompanies that year's proposed IEP for CM and explains in some detail the decisions made in that IEP and the process leading to these decisions, including previous discussions with the parents. The letter then mentions the possibility of mediation, noting that while not mandatory "it is certainly a positive step in resolving differences" and "does not in any way limit or delay a formal due process hearing or other legal procedure." The letter concludes by noting that the parents had indicated that they had a copy of the North Carolina "Handbook on Parents' Rights, July, 1994, edition, which outlines appeal options available," and encloses another copy of the handbook.

In both cases, the ALJs determined that these facts demonstrated that the school authorities provided the

parents with the requisite notice pursuant to § 150B-23(b). We find no error in the historical facts found by the ALJs, but we believe that the ALJs misapplied the law to the facts; the school authorities did not provide the statutorily required notice. Although § 150B-23(f) does not require notice in a specific form, it does, as the school boards and State concede, mandate that parents be provided express written notice of the commencement of the limitations period. As the State puts it, "the 60-day statute -- by its terms -- cannot be applied to parents without notice." Brief of Intervenor State of North Carolina at 6 n.4; see also Brief of Appellee Buncombe County Bd. of Educ. at 16 ("In order for a claim to be barred by the 60-day limitation in North Carolina . . . a school system must affirmatively provide parents with notice of the 60-day limitation."). In neither M.E. nor CM did the school system "affirmatively provide" the parents with the required notice, and so "by its terms" the limitations period "cannot be applied to [the] parents."

Section 150B-23(f) instructs that the 60-day limitations period begins only when aggrieved persons are provided written notice "of the agency decision;" the notice must "set forth the agency action" and inform aggrieved persons of "the right, the procedure, and the time limit to file a contested case petition." N.C. Gen. Stat. § 150B-23(f). To satisfy these requirements, the written notice must communicate that the agency has acted and that this action is one that triggers the right to file, within sixty days, a contested case petition for a due process hearing. Unless the school authorities do this, parents, who will often have already engaged in lengthy negotiations with the school system, will likely (and understandably) conclude that a school is simply stating its present bargaining posture, which is open to further negotiation and does not trigger any limitations period. The instant cases illustrate this precise problem.

In M.E., the letters on which the school board relies merely articulate a conditional settlement counter-offer. They were part of on-going negotiations; offers and counter-offers exchanged in this context are rarely considered by their senders or recipients as the final word on anything, even when they claim to be so. Of course, the school system's letters here did not make this claim. Rather, both were expressly made contingent on approval by the Board of Education of Buncombe County. Indeed, it is hard for us to believe that, had the parents accepted the school system's counter-offer, and the Board had failed to ratify it, school authorities would not have expected more negotiations to have ensued thereafter.[8] These letters were part of a lengthy correspondence between the parents and the school.

There was nothing about them to indicate to the parents that they had more significance than any other letters received from school officials. Parents cannot be expected to divine that such correspondence communicates conclusive agency action, which can be challenged only by resort to a due process hearing and which triggers a short limitations period to pursue such a challenge.

The letter relied upon in CM suffers from similar deficiencies. It also is one in a series of communications between the school and the parents. Although it admirably describes in some detail the action taken by the school and the reason for that action, it does not in any way indicate that the action is more significant than earlier actions taken by the school as part of its continuing

---

[8] As noted above, in the midst of the August 7 letter, the school system's representative stated that the parents had "the right to file a due process petition at any time." The parents maintain that this statement waived the school system's right to rely on the 60-day limitations period and estopped it from doing so. For the reasons stated by the district court, we reject these arguments. However, we believe that this comment does effectively demonstrate that the letters were regarded at the time, by the school system, as well as the parents, as a part of settlement negotiations, not as a notice of an appealable completed agency decision.

negotiations with the parents. Again, nothing in the letter signals to the parents that this letter, as opposed to other detailed letters from school officials received over a years-long negotiation process, triggered the limitations period. Indeed, the letter's discussion of mediation, which the parents then requested in writing four days later, combined with the many (more than 60) subsequent letters exchanged between the parties, could well have led the parents to conclude that this letter was nothing more than one in a series of negotiation communications. Again, a parent cannot be required to discern that such an innocuous letter constituted notice of decisive agency action, which could be controverted only by an impartial decision-maker after an administrative hearing, which had to be requested within sixty days of the letter.[9]

In sum, in neither case did the school systems' letters adequately notify the parents that school authorities had reached a final decision that could be challenged only in a due process hearing, which had to be requested within sixty days. See Powers v. Indiana Dept. of Educ., 61 F.3d 552, 558 n.7 (7th Cir. 1995) (holding that only when a parent "received a final denial" of her claim by state department of education did the limitations period begin). Cf. Spiegler, 866 F.2d at 649 (noting that even when a notice of denial of claimed IDEA benefits was held

---

[9] As in M.E., for the reasons stated by the district court, we reject CM's claims that this letter provides grounds for estoppel because in it school authorities assertedly lured the parents into continuing to negotiate without ever raising limitations. By the same token, the school system's state- ment in the letter that mediation "did not in anyway limit or delay a formal due process hearing" could well, as the parents suggest, have confirmed their view that the parties could continue to negotiate without "in any way limit[ing]" the parents' future right to "a formal due process hearing." In other words, again as in M.E., the challenged statement, while not estopping the school system from relying on the 60-day limitations period, does evidence the "negotiating" character of the school system's letter.

otherwise deficient, school authorities informed parents that the decision was "final.").

Indeed, in neither case did the school systems' letters provide any indication of the letters' importance sufficient to lead a parent to suspect that those letters, among the many other similar letters received from the school boards, had far more significant legal consequences than appeared on their face.[10] Nor, contrary to the school boards' assertions, did distribution of the Handbook of Parents' Rights to the parents prior to these letters (and in CM again with the assertedly critical letter) remedy the inadequacies of the letters. The handbook is a 23-page single-spaced manual generally dispensed by local educational authorities to parents of special education children in North Carolina. The manual contains a summary of laws -- both the IDEA and the state special education laws -- "governing the rights of parents" of disabled children and a copy of federal regulations setting forth "procedural safeguards under the IDEA." On page 12, the manual states that a parent "may file a petition for an impartial due process hearing . . . to challenge the identification, evaluation, or placement of a child." In the next sentence, the manual states that "[i]n order to exercise the right to a due process hearing, the parent must file a

---

[10] A school system's obligation to provide adequate notice is hardly burdensome. As M.E. points out, satisfactory notice could have been achieved as easily as adding a single sentence to the August 8 letter; such a sentence could have been worded: "Pursuant to N.C. Gen. Stat. § 150B-23 this letter constitutes your notice of final agency action, which you have a right to contest at a due process hearing by filing a contested case petition with the Office of Administrative Hearing; that petition must be filed within sixty days of receipt of this letter or you will lose your right to contest this action." The record in these cases reveals that North Carolina ALJs and state hearing review appeal officers routinely include similar language in their opinions. Moreover, other boards of education in North Carolina have apparently had little difficulty complying with the notice requirement. See, e.g., Glen III v. Charlotte-Mecklenberg Sch. Bd. of Educ., 903 F. Supp. 918, 925 (W.D.N.C. 1995).

petition within 60 days of written notice of the contested action."

Unquestionably, the handbook provides parents with information as to the correct procedure for filing a request for a due process hearing and the length of the limitations period. What it does not do is tell parents that the school system has issued a decision involving their particular child that triggers commencement of the time limitations for filing a request for due process hearing. A school system cannot make parents "notice-proof" simply by periodically distributing publications containing the law setting forth the "right, procedure, and time limit" of a request for a due process hearing. See generally Canada Life Assurance Co. v. Lebowitz, 185 F.3d 231 (4th Cir. 1999).[11]

The very reason that the North Carolina Supreme Court has refused to extend statutes of limitations "by construction" is to "ensure that parties have notice of the time limits applicable to their cases." Clay, 457 S.E.2d at 727 (emphasis added). Unless parents are informed that an agency decision in their case has triggered the limitations period, simply notifying them of the general right, procedure, and time limitation to request a due process hearing is worthless. In holding that there had been no satisfactory compliance with another statutory notice requirement, we recently explained that statutory protections "are meaningless" if those sought to be protected "do not know of their existence," Thomas v. Grand Lodge of Int'l. Ass'n. of Machinists & Aero.

---

[11] For this same reason, the fact that one of the parents is an attorney, familiar with special education law, does not cure the deficiency in the letters. For purposes of this appeal, we assume that the attorney-parent had actual knowledge that § 150B-23(f) required that a request for a due process hearing be filed within 60 days of an agency decision in order to contest that decision at a formal due process hearing. However, nothing in the record indicates the attorney-parent had actual knowledge that school authorities had issued what they considered to be an agency decision triggering this limitations period, and the parent specifically denies such knowledge.

Workers, 201 F.3d 517, 520 (4th Cir. 2000); so, too, statutory protections are meaningless when those sought to be protected do not know that the limited time for invoking those protections has commenced.

Neither the letters relied on in these cases nor the handbook distributed to the parents sufficiently notified them that school authorities no longer intended to negotiate, that they had reached a conclusive decision that could only be challenged at a due process hearing, which the parents had to request within sixty days of receipt of the letters.

Accordingly, the school boards did not comply with § 150B-23(f) and so cannot invoke that statute to bar consideration of M.E.'s claim to reimbursement or CM's claim to reimbursement for the 1995-1996 school year.[12]

IV.

To summarize, we affirm the district court's determination that the Board of Public Education of Henderson County provided CM with a free appropriate public education in the 1996-1997 school year. We reverse the district court's determination that § 150B-23(f) bars M.E.'s claim and CM's claim with regard to the 1995-1996 school year, and we remand both cases for further proceedings consistent with this opinion.

AFFIRMED IN PART AND REVERSED AND REMANDED IN PART

---

[12] The basis for the district court's holding in CM that school authorities provided notice with respect to the 1993-1994 and 1994-1995 school years is unclear. It appears that the district court may not have actually resolved this issue, focusing only on the notice provided as to the 1995-1996 year. We remand this issue to the district court, expressing no view on whether notice complying with the statute was provided in the earlier years. We also note that although the ALJ found CM's parents' claims for reimbursement in the 1993-1994 and 1994-1995 school years barred for additional reasons, the district court did not address these reasons, and so we will not consider them in the first instance.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
NORTH CAROLINA
ASHEVILLE DIVISION

CIVIL ACTION NO. 1:98CV66

CM, a minor, by and through	)
her parents, JM and EM,	)
and on their own behalf,	)
	)
Plaintiffs,	)
	)
v.	)
	)
THE BOARD OF PUBLIC	)
EDUCATION OF HENDERSON	)
COUNTY a/k/a HENDERSON	)
COUNTY PUBLIC SCHOOLS, et., al.	)
	)
Defendants.	)

Entered: October 12, 1999

MEMORANDUM OF DECISION

THIS MATTER came on for trial before the undersigned on August 19, 1999. Having considered the arguments of counsel, pleadings submitted and the administrative record, the Court enters the following findings of fact and conclusions of law.

I. PROCEDURAL HISTORY

JM and EM on behalf of CM, their autistic child, initiated this action pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400, *et.*

seq. [1]**20 U.S.C. § 1401(a)(1)(A)(i).** Plaintiffs claim that the Henderson County Board of Education (County) denied a free appropriate public education (FAPE) to their child, as required by the IDEA. **20 U.S.C.§ 1401(a)(18).**[2] On December 11,1997, Administrative Law Judge (ALJ) Meg Scott Phipps found that the County had offered to provide the child with a FAPE as required by federal and state law. Plaintiffs filed an administrative appeal and State Review Officer (SRO) Joe Walters affirmed the ALJ's decision on March 4, 1998. Having exhausted their administrative remedies, the parents brought this action pursuant to the IDEA. **20 U.S.C. § 141 5(e)(2).**

By Order filed June 16, 1999, the undersigned disposed of several matters in this action. Chief Julian Mann granted partial summary judgment to the County as to Plaintiffs' claim for reimbursement for an independent educational evaluation above the sum of $1,200. He also ruled that all claims prior to the 1996-1997 school year were time-barred. The undersigned affirmed those rulings, finding that Judge Mann's conclusions were supported by a preponderance of the evidence. In addition, the Plaintiffs' claims pursuant to the Rehabilitation Act, the Americans with Disabilities Act, 42 U.S.C. § 1983, and the 14th Amendment to the Constitution as well as all claims asserted against the individual Defendants were dismissed. Plaintiffs'

---

[1] The disorder of autism is defined as a "preoccupation with inner thoughts, . . . egocentric, subjective thinking lacking objectivity and connection with reality." ***Dorland's Medical Dictionary*** **(28th ed. 1994).**

[2] That section defines the term "free appropriate public education" as "special education and related services that-- (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

claims for the school years 1997-98 and 1998-99 and for punitive damages were also dismissed. Thus, the only claims remaining relate to the 1996-97 school year: the IDEA claim for declaratory relief and a cause of action pursuant to N.C. Gen. Stat. § 115C-106.[3] ***See* Memorandum and Order, filed June 16, 1999, at 35-37.**

II. STANDARD OF REVIEW

Section 1415(e)(2) of Title 20, United States Code, provides in pertinent part that in "any action brought under this [statute] the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." The Fourth Circuit has instructed district courts to bear in mind that "the touchstone of IDEA is the actual provision of a free appropriate public education." ***Sellers by Sellers* v. *School Bd. of City of Manassas, Va.*, 141 F.3d 524, 527 (4th Cir.), *cert. denied*, 119 S. Ct. 168 (1998).**

The Supreme Court has held that a proper review of the state's determination requires a twofold inquiry. ***Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 201 (1982).** The district court must decide: (1) whether the State complied with the IDEA's procedural requirements in developing and implementing the Individualized Education Program (IEP) for the child at issue, and (2) whether the IEP is "reasonably calculated" to enable that child to receive educational benefits. ***Id.*, at 206-07.** The Court also instructed reviewing courts to make "independent decision[s] based on a preponderance of the evidence." ***Id.*** The Fourth Circuit refined this standard in *Doyle v. Arlington County Sch. Rd.*, 953 F.2d 100 4th Cir.

---

[3] "The policy of the State is to provide a free appropriate publicly supported education to every child with special needs."

1991), where it held that findings of fact by ALJ's and hearing officers in IDEA cases "are entitled to be considered *prima facie* correct, akin to the traditional sense of permitting a result to be based on such fact-finding, but not requiring it." ***Id.*, at 105.** In essence, district courts must "'make an independent decision based on a preponderance of the evidence, giving due weight to state administrative proceedings.'" ***Board Educ. of Montgomery County v. Brett Y*, 155 F.3d 557 (table), 1998 WL 390553 at **5 (4th Cir. 1998) (quoting *Rowley*, 458 U.S. at 206).**

Moreover, the district court may not "substitute [its] own notions of sound educational policy for those of the school authorities." ***Hartmaun by Hartmann v. Loudoun County Bd. Of Educ.*, 118 F.3d 996, 999 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 688 (1998).** Indeed, the district court must defer to the State reviewing officer's (SRO) credibility determinations. ***Doyle, supra.*** And, the SRO must defer to the credibility determinations made by the hearing officer because he or she had the opportunity to hear the testimony. ***Id.*, at 104.** Finally, the burden of proof of establishing a violation of the IDEA falls on the party challenging the administrative findings. ***Barnett by Barnett v. Fairfax County Sch. Bd.*, 927 F.2d 146, 152 (4th Cir. 1991).**

As to the standard of review applicable to the state law claim, "[n]o distinction is made between federal and pendent state claims if the claims are brought in federal court. Although the North Carolina Administrative Procedure Act limits a state court reviewing an agency decision to substantial evidence review,. . . 'pertinent federal law. . . specifies otherwise.' The district court properly followed federal procedural law in reviewing independently both the federal and state law claims." ***Burke County Bd. of Educ. v. Denton*, 895 F.2d 973, 983 (4th Cir. 1990) (citations omitted).**

III. FINDINGS OF FACT

A. The IEP for the 1996-97 school year.

Plaintiffs moved from New Hampshire to North Carolina in 1993 for the sole purpose of placing their child in the TEACCH [4] program offered through the state's schools. **Volume III, Certified Transcript of Hearing before the Office of Administrative Hearings, at 13 (hereafter, Transcript, Vol. III, at 13.).** CM was first enrolled in the County school system in August 1993. **Exhibit A, Affidavit of Judy Cook, *attached to* Respondent's Brief in Support of Summary Judgment, filed in the Office of Administrative hearings on February 26, 1997.** An IEP was developed for her and she was placed in the Helping Hand Center which offered a TEACCH preschool program. ***Id.*** However, in November 1993, after only three months in the program, CM's parents withdrew her from the program in order to implement the Lovaas[5] program in their home and to place her in a Montessori preschool. ***Id.;* Respondent's Exhibit 72 before the Office of Administrative Hearings, Letter dated November 23, 1993, from JM to County.** The County continued to provide CM with free speech therapy, although not required to do so under state law.[6] **Cook Affidavit; Transcript, Vol. XI, at 132.**

In September 1994, JM met with Candy Priest, Supervisor of the Exceptional Children's Program for the County, to obtain a copy of CM's file. ***Id.*** During that

---

[4] Treatment and Education of Autistic and Related Communication Handicapped Children program.

[5] Dr. Ivar Lovaas developed a form of treatment for autistic preschoolers.

[6] In fact, at the time of the hearing in 1997 the County continued to provide speech services to the child. **Transcript, Vol. XI, at 142.**

conversation, JM explained CM's progress in the Lovaas program and Ms. Priest volunteered that the County could provide services to CM in her preschool setting. ***Id.*, at 144.** JM declined, stating that he had not informed the preschool that CM was autistic but had advised only that she had a communication disorder. ***Id.***

However, in December 1994, the Plaintiffs approached the County about paying for the Lovaas therapy they were providing CM in their home. ***Id.*, at 144-45.** A series of meetings were held in January and February 1995 to develop an IEP for CM. ***Id.*, 145-46.** Ms. Priest testified,

> Over and over again it just kept coming back that—that, yes, we were proud of her academic skills, but what she absolutely had to do was use these skills and use her language to communicate functionally.... We were finding that C. could-could respond to a prompt, but that was—I mean, every time we saw her, someone had to say, "C., say hello," [T]here was always someone there with her, either guiding, moving her or... it was always a prompt and then expecting a response. And we in education know that's not—that's not how we-how we learn or how we progress or how we-how we survive in society.

***Id.*, at 150-51.** The County considered four options for CM: the Helping Hand Program, Sharon Burlingame's preschool handicapped classroom, the Lovaas program and the Bruce Drysdale's autistic classroom.[7] **Transcript, Vol. VI, at 196.** The County concluded the best option for CM was Bruce Drysdale's full-day autistic classroom with some mainstreaming into the regular kindergarten. ***Id.*, at 197.** By

---

[7] Within the County is located the Bruce Drysdale School at which a classroom for autistic children was in existence.

mid-February, the County had completed the IEP for CM but her parents continued to insist that the County fund a Lovaas program. ***Id.*, at 204; Cook Affidavit.** There was no further contact from the Plaintiffs until June 1995, when they requested an independent educational evaluation of the child. **Cook Affidavit.** Because the last evaluation had been completed two years prior to that time, Ms. Cook felt it was necessary to obtain a more recent evaluation. ***Id.*** In the event the parents disagreed with that evaluation, they could then pursue an independent evaluation. ***Id.*** School personnel evaluated CM in August and September 1995. **Transcript, Vol. VIII, at 219-20.** Plaintiffs disagreed with the County's evaluation and requested an independent one be performed. **Cook Affidavit, *supra.*** Ms. Cook then sent them a letter outlining the procedures, including the $1,200 limit for reimbursement, and listing facilities and agencies competent to perform the evaluation. ***Id.*** Plaintiffs responded that four of those suggested were not competent to perform the evaluation, the fifth was rejected by the Plaintiffsas biased, and the sixth had a waiting list. **Respondent's Exhibit 117, Letter from JM to Judy Cook, dated January 5, 1996.** The parents obtained an evaluation from Dr. Jan Handleman in New Jersey, the full cost of which the County refused to reimburse. **Cook Affidavit, *supra.*** The undersigned has previously affirmed the grant of partial summary judgment on this issue by the ALJ on the ground that the parents were unreasonable.

Dr. Handleman issued his report on March *25,* 1996, and it was received by the County in April 1996.[8] **Respondent's Exhibit 57.** He concluded that "[a]pproximately forty hours a week of comprehensive behavioral programming is suggested, which emphasizes

---

[8] Interestingly, before the County could review Dr. Handleman's report, the Plaintiffs had already reported to CM's preschool that she would be attending a small private school during the coming year. **Respondent's Exhibit 188.**

individualized and discrete-trial teaching[9].... Altering the current commitment to specialized and individualized programming could negatively impact on the very' positive gains that [CM] has made and the momentum she is demonstrating toward future educational accomplishments." *Id.* Dr. Handleman testified that he did not conduct any standardized tests on CM but reviewed test scores and records provided to him by the Plaintiffs. **Video Deposition of Dr. Jan Handleman.** He observed CM for two hours while she was with her Lovaas therapist. *Id.* In addition, he reviewed a video taken of CM by her mother. **Transcript, Vol. V, 42.** Dr. Handleman admitted that he had relied, in forming his opinion, on information which could have been incomplete. **Video Deposition, *supra.*** For example, he was unaware that CM's therapist was a recent college graduate. *Id.* The videotape showed CM's behavior as stabilized and compliant; but, he admitted that he was unable to assess any behavior which would not have been shown on the tape. *Id.* And, he admitted he was not provided with any information about the County's program except that given by the parents. *Id.*

At this point, the only IEP for CM was the one prepared in the fall of 1995. The Plaintiffs had submitted a copy of this IEP to Michael Guiou, their Lovaas consultant, who contested many of the assessments. **Respondent's Exhibit 9.** When Judy Cook received Dr. Handleman's report, she felt it did not add any substantive information which could be used in drafting a new IEP. **Transcript, Vol. VIII, at 224.** But, CM's parents and Mr. Guiou contended she had mastered many of the goals on the 1995 IEP and based on Dr. Handelman's report, the County could

---

[9] "Discrete trial teaching (DTT) is one component of the Lovaas type of (applied behavioral analysis] and involves a directive followed rapidly with a consequence based on whether the student gives the correct response." ***T.H. v. Board of Educ. of Palatine Community Consol. Sch. Dist. 15*, 55 F.Supp.2d 830, 836 n.8 (N.D. Ill. 1999).**

not assess the validity of that contention. *Id.;* **Transcript, Vol. IX, at 18.** Moreover, Dr. Handleman's report contained no information concerning CM's current level of performance; it was simply an observation devoid of the type of information necessary to draft an IEP. **Transcript, Vol. IX, at 12.** Therefore, because CM's parents were challenging the 1995 IEP as inadequate and inappropriate, Ms. Cook felt an additional evaluation was appropriate, especially in view of the months which had passed. **Transcript, Vol. VIII, at 224.** As a result, Ms. Cook obtained, with the parents' consent, an informal assessment of CM by Dr. Victoria Shea, an expert on autism. **Transcript, Vol. VIII, at 225-28; Vol. XVIII, at 127-41.**

Dr. Shea observed CM at her preschool and in her home program for a total of three hours and received and reviewed her records. *Id.,* **at 228; Respondent's Exhibit 58.**

> By report and observation, [CM] demonstrates typical features of autism (i.e. impairments in social and communication skills, and unusual behaviors and interests). At the time of the last standardized assessment (8/95), she demonstrated widely scattered cognitive skills, low average adaptive skills, significant expressive language delays, and minimal fine motor delays. I observed [CM] to be very compliant with verbal directions from her tutors. In the absence of these verbal prompts, however, I observed several instances in which she was confused about what to do, where to go, how long to continue, or what would happen next.. . . The comments on [the County's] draft IEP by the UCLA consultant [Michael Guiou] indicated that the majority of the proposed objectives had been mastered. . .

However, there were [] skills described as mastered which I observed [CM] not to have mastered. These included responding to her name without prompting, making a choice between activities (several times when given a choice she said "yes"), washing her hands independently (she need a prompt to stop), and responding accurately to questions (Is Jessica your Daddy? "yes;" Where does Minnie Mouse live? [CM] gave her own address). I also observed that [CM] appeared to have memorized some expressive language that she did not fully understand (when asked the steps involved in washing her face, [CM] began "turn off water, get bathing suit. . ." and needed a prompt for "soap" before continuing with logical steps of rinsing, etc.). Since present level of performance is the foundation for development of IEP goals, the question of[CM's] current skill levels is problematic. . . . The evaluation report by Dr. Handleman (3/96) did not contain specific information about skill levels. Based on my observations, I question the representation by the UCLA consultant that almost all the proposed IEP objectives have been mastered.. . . A second comment on the [County's] draft IEP is that I think a major focus of [CM's] education should be on the development of independence. Like many students with autism, [CM] has learned to follow directions from adults. . . While [CM] can memorize and repeat fairly lengthy sequences of verbal dialogue, her functional use of language is much more limited. . . From my observation in the preschool, [CM] already feels comfortable with parallel play near other

> children, and she accepts social interactions initiated by familiar peers. . . . I [make] recommendations to increase the emphasis on independence, functional communication, and concepts underlying social interactions.

Respondent's Exhibit 58. Dr. Shea had other reasons for doubting the conclusions reached in Dr. Handleman's report. When she reviewed CM's records and notes from her preschool and therapy, there were reports of tantrums and screaming during the same time period that Dr. Handleman observed CM to be compliant. **Transcript, Vol. XVII1, 159-62.** In fact, notes from the Lovaas therapy show that in January 1996, CM was "still throwing tantrums quite a bit." **UCLA Book 7 (CM's Therapy Log Book), Bates No. 005641-42.** In the spring of 1996, her behavior was so bad that her Lovaas therapist reported that if something did not change, CM would be expelled from school **Transcript, Vol. XIV, 238.** And, in September and October 1996, CM was still having tantrums, biting and butting her head. **UCLA Book 7, Bates Nos. 005607, 005612, 005614.**

At the end of CM's preschool for 1996, her mother asked her teachers to respond to a questionnaire concerning her development. **Respondent's Exhibit 194.** A comparison of their responses to the opinion of the Michael Guiou shows that many of the items he felt were mastered had presented problems in preschool, especially communication skills. And, her preschool teachers' responses showed that most of CM's positive behavior followed prompting by her Lovaas therapist.

In addition to the assessment by Dr. Shea, Ms. Cook had Laurie McDanel, an exceptional children teacher, and Janna Beekman-Forst, a psychologist, visit with CM in May 1996. **Respondent's Exhibits 59, 59A.** They observed CM during a Lovaas therapy session. **Transcript, Vol. X, 169.** Although CM could respond to questions such as, "What would you do if.. .," she was unable to answer questions such

as, "What did you have for lunch?" ***Id.*** In between questions, she would engage in unintelligible speech. ***Id.*, at 170.** Her therapist told her a story and then asked CM to repeat it but she was unable to do so. ***Id.*, at 172.** She did not independently, or with prompting, engage in imaginative play. ***Id.*, at 173.** During the breaks which CM was given, she began to play and communicate but was halted and told to go back to work. ***Id.*, at 181.** This seemed self-defeating to Ms. McDanel, who teaches autistic children in the County system. From her observation of CM, the child was not enjoying herself. ***Id.*, at 184.** In her professional opinion, the Lovaas therapy

> was very intense. I thought that it seemed to ask her to provide lots of things from memory, wasn't eliciting anything spontaneous, but required her to rely upon her rote memory. I thought it was a lot of auditory directions that can be very overpowering to a child with autism and to some adults. I did not feel that what she was able to produce during that time was—that what she actually produced, I think, could have been done in less than two hours of time—that intense time of constantly going over the same things over and over. And I also thought that many times it was really unclear, because it was unclear to me, whether she actually got the answer right or not. It was either "pretty good" or they kept repeating the same question, and she kept answering the same answer. So I think that's confusing.

***Id.*, at 185.** Ms. McDanel also met with CM's mother after this session in order to obtain additional information for use in preparing an IEP. ***Id.*, at 186.** She was not told during

any of these meetings that there were behavioral problems with CM. ***Id.***

Dr. Shea felt that CM's current level of performance was not known and suggested the readministration of the Brigance test prior to formulating the IEP. **Transcript, Vol. IX, at 20-22.** The Plaintiffs did not agree to the administration of that test and determined to have private testing done prior to the IEP meeting. **Transcript, Vol. V, at 43-45.** They chose Dr. Thomas Boyle, a psychologist in New Jersey who in the past had worked with Dr. Lovaas. ***Id.*, at 48.** Dr. Boyle administered standardized testing but admitted in his report that the standard protocol had to be modified at times in order to allow CM to participate in the task. **Respondent's Exhibit 60.** Those modifications would have increased her ability to perform well, if they had any impact. **Transcript, Vol. XV, at 73.** He concluded that if she were placed in a full-day school, she would require 15 to 20 hours per week of one-on-one teaching focusing on her language deficits. ***Id.*** Initially, Dr. Boyle included CM's IQ scores in the report; however, her parents asked him to delete them. **Transcript, Vol. XV, at 21.** When Dr. Boyle prepares an evaluation for a school, it is his normal practice to report the IQ scores. ***Id.*, at 95.** CM's full scale IQ was *57* which is in the mildly mentally handicapped range. ***Id.*, at 94, 113.** Her language skills were very poor; and thus, he could not be sure she understood the questions being asked. ***Id.*, at 24.** He found she was able to respond to some things through rote memory but when a task required understanding the meaning of a sentence, she had difficulty. ***Id.*, at 27.**

Dr. Boyle was contacted again by the Plaintiffs in early 1997. They wanted him to evaluate CM a second time because they felt her true abilities were not shown in the July report and at the time, her medication was being changed. ***Id.*, at 57; Respondent's Exhibit 61.** CM's mother asked him to use different standardized tests than had been used in the July testing so that no one would think she had been trained on the test. **Transcript, Vol. XV, at 57.** In Dr.

Boyle's opinion, that was an unusual request because "no one has ever said that to me before. No one has ever expressed that someone might do that. But no one has ever requested a reevaluation that quickly either." ***Id.*** The Plaintiffs had a particular concern about CM's IQ scores. ***Id.*,** **at 119-20.** Dr. Boyle found that CM's IQ scores had increased but she still had significant deficits in expressive and receptive language skills. ***Id.*,** **at 58-59.** He did not alter his recommendation. Dr. Boyle was not told of any behavior problems with CM during either evaluation. ***Id.*,** **at 68.**

The Plaintiffs retained a third person to evaluate CM. Dr. Jan Blacher is an education professor in California who observed both CM and the County's autistic classrooms in August 1996. Dr. Blacher provided written observations to the Plaintiffs concerning the TEACCH classrooms which contained scathing criticisms of the teachers, the aides, and the program in general.[10] **Respondent's Exhibit 62.** Nonetheless, she testified that CM did not need 40 hours per week of Lovaas therapy and should be in a classroom setting part of the time. **Transcript, Vol. VIII, at 13.**

On August 14, 1996, the parties were finally able to have a meeting concerning CM's IEP for the 1996-97 school year. **Respondent's Exhibit 68.** The Plaintiffs felt the goals set for CM were very well done. ***Id.*** CM's mother expressed her desire that CM be placed in a classroom with "typically developing peers" for half the school day and 20 hours per week of one-on-one instruction. ***Id.*** Ms. McDanel stated she was concerned that CM might be unable to adjust and perform in a classroom of 20 children since she had never been with such a large group. ***Id.*** At the Plaintiffs' request the meeting was adjourned to a later date when CM's Lovaas consultant would be able to attend. ***Id.***

The second meeting occurred on September 13, 1996, and was attended by Michael Guiou, the Lovaas consultant.

---

[10] Ms. McDanel, the teacher whom Dr. Blacher observed, strenuously contested the comments made.

Respondent's Exhibit 69. Also present was a kindergarten teacher from a regular kindergarten class since there was a possibility CM would be placed there. ***Id.*** The Plaintiffs acknowledged that the draft IEP was "a very good IEP" to which they had made minor changes after consulting with Mr. Guiou. ***Id.*** Of primary concern was the distinction between individualized instruction versus one-on-one instruction. ***Id.*** Ms. Cook explained the two terms could mean the same thing; but, primarily, individualized instruction is instruction designed to meet the unique needs of a child. ***Id.*** There would be no guarantee of one-on-one instruction for a certain period of time each week because the teacher is allowed to use the type of instruction necessary to teach the skill involved. ***Id.*** Although agreeing that the IEP goals were good, Mr. Guiou felt CM must have one-on-one instruction. ***Id.*** Ultimately, Plaintiffs explained that by one-on-one instruction they meant a "shadow," an aide or teacher, should be available throughout each day to assist CM. If she did not understand what the teacher was teaching, the shadow was to step in to assure CM would grasp the task. ***Id.*** Plaintiffs agreed that much of the time this person would not be needed; yet, they insisted such a person be available. ***Id.*** It was explained that in the County setting such a person was available but not exclusively for CM. ***Id.*** Because it was clear an agreement concerning placement could not be reached, the parties went through the IEP goals. ***Id.*** When a discussion of individualized versus one-on-one instruction resumed, it was clear that the difference lay in methodology. This meeting lasted for at least half of the day. **Transcript, Vol. IX, at 51.** During this and the prior meeting there was no mention that CM was experiencing any behavior problems. ***Id.*** This was important information because it should have been addressed in the IEP. ***Id.*, 52.** The next meeting was scheduled for September 23, 1996.

At that meeting, Ms. Cook presented significant revisions to the IEP based on the last meeting; and again, the

parties reviewed the IEP paragraph by paragraph, page by page. ***Id.*, at 54**. The parties, and their attorneys, reached an agreement on the goals. ***Id.*, at 55**. The IEP called for CM to receive a full-day program with half of each day in a regular kindergarten class accompanied at all times by an adult (shadow) to assist as needed, one-on-one instruction from Ms. McDanel, the special education teacher, in reading, math and written language for one and a half hours each day, guided instruction for one hour each day in the autism classroom and three hours of speech therapy each week. **Respondent's Exhibit 70.** The Plaintiffs responded that they did not want CM in the autistic classroom for any portion of the day because she might learn inappropriate behavior. ***Id.*** It was explained that while CM was there the other children in that classroom would either be doing their own "mainstreaming" or independent activities, thus reducing the possibility that CM would see inappropriate behavior and learn to imitate it. ***Id.*** The Plaintiffs did not agree and continued to insist on their choice of placement. In addition, they asked that the school system pay for the speech therapist to travel to CM's private school to provide therapy because EM, the mother, did not have the time to take CM to the therapist's private office. ***Id.*** It was explained that the school system could not send a therapist into a private school. ***Id.***

The IEP drafted for CM for the 1996-97 school year provided for CM to have "one-to-one instruction to learn new academic skills. She needs guided practice with an adult to maintain skills. She needs socialization and communication skills which can best be practiced with typically developing peers. Expanded language goals necessitate additional speech." **Respondent's Exhibit 10.** As a result, CM was offered a program providing her with five hours per week of guided instruction in the autism classroom, seven and one-half hours of one-on-one instruction, three hours of speech therapy and the remainder of her time in a regular kindergarten classroom accompanied

at all times by an adult. ***Id.*** The Plaintiffs did not accept the IEP because it did not provide the Lovaas methodology and would have placed CM in the autism classroom for a portion of each day. ***Id.*** Both parents testified that the only program they would have accepted was the Lovaas program. **Transcript, Vol. VI, at 110.** By that, they meant not only a Lovaas shadow with CM at all times, but also the use of discrete trial teaching. **Respondent's Exhibit 7.** And, they insisted that the shadow be the same person each day. **Transcript, Vol. VI, at 115.** Moreover, the Plaintiffs did not approve of the method described by Ms. McDanel for dealing with tantrums which occur in the regular classroom because a child having tantrums would be returned to the TEACCH classroom. **Transcript, Vol. VI, at 108.**

For the 1996-97 school year, CM was placed in the K-2[1] class at the Covenant Academy, a private religious school with six children in the class: four kindergartners, a first-grader and a second-grader. **Transcript. Vol. XIV, at 178-79.** CM's shadow for the school year was Caroline Dilworth, who had been her Lovaas therapist the prior year. Dilworth, who has a college degree in psychology, began working with CM two months after graduation and without any background in working with autistic children. ***Id.,* at 198.** Despite the low student ratio, CM's kindergarten teacher, Ms. Salter, did not have a very organized curriculum and was not thought to be a good teacher by Ms. Dilworth. ***Id.*** Salter was replaced in February 1997. ***Id.***

In the fall of 1996, CM's mother recorded in her logs that CM had forgotten much of what she had learned, had become lazy and still had not obtained spontaneous language. ***Id.,* at 203, 205.** Ms. Dilworth, who accompanied CM to school each day, reported in October that CM was not responding to her name or to naturalized statements appropriately. ***Id.,* at 288.** She required much prompting to

---

[1] A class encompassing children from kindergarten through the second grade.

participate in class. *Id.* At the end of October, Ms. Dilworth reported: "Many times prompted today. One time, no prompt. Note: This is an area of growing concern. At times her peers yell her name two or three times before she will or not look their way." *Id.*, at 289. And, CM did not listen when her teacher read stories, although she did do so when Ms. Dilworth read the story. *Id.*, at 292. Ms. Dilworth readily admitted that "it could have been because she has been working with me for two years. . . ." *Id.* All through the spring of 1997, CM required frequent prompting. *Id.*, at 208-12. Although present in the classroom as CM's Lovaas shadow, Ms. Dilworth also worked with other children and not exclusively with CM. *Id.*, at 294.

CM continued to have behavior problems in 1996. *Id.*, at 220, 256-63. In fact, during the first months after CM began Covenant Academy, she had significant problems with tantrums. *Id.*, at 263-66. She had tantrums on an almost daily basis, many of which were witnessed by her peers, resulting in problems in her socialization. *Id.* On one occasion, she had a tantrum while the teacher was out of the room. Ms. Dilworth, who had been left alone with the classroom, could not remove CM from the room and thus, her classmates witnessed a ten minute tantrum. *Id.*, at 266. This occurred on the same day that Michael Guiou, CM's Lovaas consultant, met with the school officials concerning her IEP; yet, no mention was made to them of these problems. *Id.* This type of behavior continued throughout the fall despite various methods of dealing with them by her therapists. *Id.*, at 267-76. In fact, new behavior problems appeared in October and November of 1996: biting and hair pulling. *Id.*, at 277. In January 1997, CM's tantrums at home were averaging eleven minutes in length and included biting, hair-pulling, screaming and kicking. *Id.*, at 279. And, in mid-January 1997 she had two tantrums at school. *Id.*, at 283. In fact, Ms. Dilworth reported in early 1997 that it was necessary to remove CM from the classroom in order to work with her on academic work. *Id.*, at 285.

B. The methodologies at issue.

The Lovaas methodology was developed by Dr. Ivar Lovaas as a result of a three year study conducted of 19 children who were diagnosed as autistic. **Petitioner's Exhibit 14, "Behavioral Treatment of Autistic Children".** All of the children were aged three or under and received 40 hours per week of one-on-one instruction in their home. ***Id.*** At the end of the study, nine of the children had achieved normal JQ's and were described as indistinguishable from their peers. Eight were placed in aphasic (communication handicapped) classes and the remaining two were in autism or special education classes. ***Id.***

Dr. Jacqueline Wynn is the director of the Lovaas Institute and testified as an expert in the use of Lovaas therapy to treat autistic children.[12] Lovaas therapy is one version of Applied Behavioral Analysis (ABA) which "consists of breaking down activities into discrete individual tasks and rewarding the child's accomplishment. The child eventually learns to integrate the information and associate instruction with a given activity." ***Mr. X v. New York State Educ .Dept.*, 975 F. Supp. 546, 548 n.1 (S.D.N.Y. 1997); Transcript, Vol. XIII, at 71.** Discrete trial teaching is one aspect of the program and involves a prompt to the child followed rapidly with a consequence based on whether the child gives the appropriate response. ***Id.; T.H., supra.*** In the Lovaas program, when a child has negative behavior, the therapist analyzes why and in what context it is happening. **Transcript, Vol. XIII, at 27-28.** This allows the therapist to determine the reason behind the behavior, such as seeking attention, and to predict when it will occur. ***Id.*** Then, the therapist devises an intervention plan, a plan to stop the behavior. ***Id.*, at 29.** For example, if the behavior is occurring because the child is frustrated by a task, it may be that the

---

12 She was not accepted as an expert in the disease of autism.

task is too difficult and therefore, needs to be broken down. ***Id.*, at 30.** "[M]any of the original Lovaas techniques are no longer considered appropriate, e.g. using electroshock as an adverse consequence." ***T.H.*, 55 F.Supp.2d at 836 n.8.** Another technique originally used was hitting the child if he or she engaged in self-stimulatory behavior. **Transcript, Vol. XIII, at 206-07.**

The Lovaas program designs a treatment package for the child which begins with 40 hours per week of one-on-one instruction in the child's home. ***Id.*, at 45.** Later, more and more of the time is spent in a socialization setting of school, peer play and community activities. ***Id.*** An essential component of the program is the involvement of the parents in the therapy so that any gains made by the child with his therapist are not lost. ***Id.*, at 45-46.** The parent is expected to help the child generalize the skills learned during therapy to the everyday world. ***Id.*, at 75.** According to Dr. Wynn, a major difference between Lovaas therapy and other treatments for autistic children is that intervention in the Lovaas program begins at the preschool versus school age. ***Id.*,at 49.**

The program also uses a therapy log which provides continuity among the therapists and aides involved. ***Id.*, at 96.** It is used to record behavior, skills and problem areas. ***Id.*** It becomes a record of what a child knows and does not know. ***Id.*** The program has an hierarchy of goals in different categories which are to be mastered. ***Id.*, at 160.** Once a skill is mastered, the child is moved on to a new one. ***Id.*, at 102.** If he or she regresses, the therapist goes back to the last skill. ***Id.*, at 105.** The ultimate goal is for the child to generalize the skills learned in therapy. ***Id.*, at 103.** Thus, drills are used to teach the children. For example, the receptive label drill is designed to make sure the child understands the name of an object, rather than repeating it from rote memory. ***Id.*, at 32.** This is done to ensure that the child relies on auditory versus visual skills in processing language. ***Id.*, at 33.** The Lovaas program relies on prompts to ensure that the child acquires a

skill and remains successful with it. ***Id.*, at 12 1-22.** "But the goal is to start with the prompt and then fade out the prompt and get rid of it so the child is working independently." ***Id.*, at 122.** Successes are reinforced, usually by physical contact or food. ***Id.*, at 37.** Eighty percent of the Lovaas program focuses on the development of language skills. ***Id.*, at 110.** Typically, the program begins around age three and continues until seven or eight. ***Id.*, at 135.** On cross-examination, Dr. Wynn testified that the TEACCH program also begins at preschool age and relies on heavy parental involvement. ***Id.*, at 181.**

Dr. Lee Marcus is the clinical director of the TEACCH Center in Chapel Hill, North Carolina. **Transcript, Vol. XIX, at 6.** The TEACCH program creates a classroom environment for autistic children which is predictable and therefore understandable. ***Id.*, at 76.** Structure is very important to autistic children because they cannot handle numerous stimuli at once. ***Id.***

The physical space of their classroom is arranged in a manner that explains to the child what will happen in different parts of the learning program. ***Id.*, at 77.** Thus, the autistic child, who has strong visual skills, is able to rely on those skills to feel comfortable with the setting. ***Id.*, at 78.** The program also relies on structure in the form of a daily schedule because autistic children have difficulty understanding the concept of time. ***Id.*, at 79.** The daily schedule is presented to the child according to each child's abilities. **Id., 80.** Thus, some may be written and others may rely on color cues. But the purpose of the schedule is to allow the child to know in detail what will occur at each portion of the day. ***Id.*, at 81.** This is done because autistic children do not understand the concept of sequencing and become very anxious about what will occur next in their day. ***Id.*, at 82.** Each child has an individual work system which is designed to help the child become independent in carrying out his assignments. ***Id.*, at 83.** Within this work system are four questions for each child to integrate during his

assignment: What am I supposed to do?; How long will the work last?; How do I know when I am finished?; and What comes next? *Id.*, at 84. The program uses visual cues as well as teacher directives. This increases independence and reduces frustration caused by an inability to understand auditory directives. *Id.*, at 89. Like Lovaas therapy, TEACCH allows the child to learn one task which has been broken into its simplest parts before going on to a more difficult task. *Id.*, at 98.

Another aspect of the program involves teaching language and communication skills because "[w]hat distinguishes children with autism from other language handicapped people is not so much the words, although a lot of kids have great difficulty learning words, it's using those words in a social context to communicate naturally, spontaneously, and meaningfully." *Id.*, at 106. This requires having the child learn and understand that communication involves two or more people since autistic children are self-contained. *Id.* The first goal is to get communication going in any form as long as there is a connection between the child and the teacher or peers. *Id.*, at 109. This requires an assessment of the child's current skills in order to know how to elicit spontaneous communication. *Id.*, at 111. Usually this is done by involving the child in an activity which interests him, such as a picture exchange in which the child names the object. *Id.*, at 112-13. Dr. Marcus admitted that the TEACCH program is not the only manner in which autistic children may learn but noted that many of the same features of this program are used in others. *Id.*, at 120.

The TEACCH method does not use behavior modification to deal with behavior problems because that method is a consequential approach. *Id.*, at 121. Instead, it uses behavior management which means that, based on the child's individual needs, the environment is structured to prevent problems. *Id.* If the child, despite these measures, is exhibiting aggressive or self-injurious behavior, a new assessment is done. *Id.*, at 122. It may be that too much is

being expected of the child or it may be necessary to use a consequential approach in close proximity to the behavior. ***Id.*** Many behavior problems in autistic children, as with normal children, are alternative forms of communication. ***Id.*, at 123.** They are signs of stress or frustration. ***Id.*** For example, rather than placing a child in a 'time out" each time he kicks, he will be rewarded each time he does not kick. ***Id.*, at 124.** But at the root of the solution will be a determination of why the behavior occurs. ***Id.*, at 125.** Only in this manner can the need for the behavior be eliminated rather than simply suppressing the behavior itself. ***Id.*** Tantrums may occur because the child is frustrated at a task, the task has been going on too long, or it is too difficult. ***Id.*, at 125-30.** Although some people call it a form of task avoidance, one must understand why the child wants to avoid the task in order to understand the cause of the behavior. ***Id.***

Dr. Marcus feels that TEACCH differs from Lovaas philosophically, strategically and in the manner in which success is measured. ***Id.*, at 139.** The Lovaas methodology views autism as a collection of aberrant behaviors which may be controlled by an intensive behavior/discrete trial teaching approach. ***Id.*, at 140.** TEACCH views each autistic child as having individual differences. ***Id.*, at 142.** "[W]hile you can improve on them and help and move people along in some cases to the point that they might be indistinguishable from normal, [TEACCH] doesn't really [] accept the notion that everything is fixable and that autism is merely a collection of unusual behavior or behaviors and deficits." ***Id.*** Moreover, TEACCH provides a predictable environment to enable the child to become independent by learning. ***Id.*, at 145.** The Lovaas approach uses the "one-to-one adult-initiated process and because of what autism is, and the fact that people with autism are potentially prompt dependent that what happens is that the person with autism becomes dependent on the adult who is doing the teaching." ***Id.*** They become dependent on verbal cues rather than

learning to integrate cues by using their visual skills. ***Id.*** Lovaas also has a predesigned curriculum which is imposed on the child, rather than a curriculum designed for that specific child. ***Id.*, at 147.** However, TEACCH uses developmental psychology to ensure that the child "crawls before he walks" rather than teaching the child to walk when he does not understand the concept of crawling. ***Id.*, at 151.** Another difference between the two programs is the use in the Lovaas program of high school and college graduates as the therapists after they have been trained at the Lovaas Institute. ***Id.*, at 154.** "This is a very complex disorder, and people who are engaged in a clinical enterprise or an educational enterprise need to have good—they need to have a lot of knowledge in a lot of areas. And even then--even with that, you need specialized training and ongoing support." ***Id.*** It is also important that the learning occur in the classroom, as opposed to the child's home, because "[l]earning must go on in the context in which it can be generalized." ***Id.*, at 158.** One-on-one instruction is used in the TEACCH classroom but not to the exclusion of other methods of instruction. Many parents become concerned that their child will develop inappropriate behavior from the other children in the class. ***Id.*, at 179.** However, autistic children have difficulty imitating behavior; therefore, if the child is at such a level of development that she is capable of imitation, there are other methods of working with her to avoid the problem. ***Id.*, at 180.**

C. The program offered by the County.

The 1996-97 JEP would have placed CM, who was almost seven years old, in Ms. McDanel's classroom for autistic children at the Bruce Drysdale Elementary School. At that time, she had five students in her classroom, one girl and four boys ranging in age from six to eleven years. **Transcript, Vol. X, at 18.** Another child who is in a regular second grade classroom receives instruction from her

one hour each day. *Id.* A third student who was taught by Ms. McDanel in two previous years is in a regular fifth grade classroom and goes to visit one hour each week as a reward. *Id.* One day each week, two fourth graders from a regular classroom come into her classroom as a means of reverse mainstreaming in order to teach socialization skills. *Id.*, at 19.

One of the students in her classroom goes to the library each morning where he uses the computer because he is learning to write sentences. *Id.*, at 42-43. Another student begins his day by doing independent work because it helps him settle into the routine. *Id.*, at 44. A third student is in the play area and a fourth is also doing independent work. *Id.*, at 45. Data is kept on each child and when the teacher and aides rotate, they discuss each child's accomplishments and goals. *Id.*, at 50. If a child's IEP requires it, a daily anecdotal log is kept and each child who is mainstreamed into a regular classroom has a daily log. *Id.*, at 54. Each child receives one-on-one instruction with Ms. McDanel each day. *Id.*, at 59. While the students work independently, they are monitored by an aide. *Id.*, at 64. Each morning the children have time on the playground. *Id.*, at 69.

Ms. McDanel feels the environment of the room is important because autistic children are easily distracted. *Id.*, at 150. In addition to independent work time and one-on-one instruction, there are times allotted for communication and social skills development. *Id.* She finds an area of interest to each child and then begins to build a personal relationship with him based on that interest. *Id.*, at 151. This teaches them to communicate. *Id.* By having the classroom environment comforting to the children, they are able to adjust to the changes in their daily schedule, making the transition between tasks and different times of the day. *Id.* This allows them to transfer these skills beyond the classroom. *Id.*, at 152. Also, it frees them from fear and confusion and allows them to learn. *Id.*, at 152-53. Each

week in the play area, they introduce different scenes, such as camping sites, to promote interest in the children. ***Id.*, at 155.** This encourages spontaneous communication. ***Id.*** If CM had come into the class, a third teacher's aid would have been hired. ***Id.*, at 28, 115.**

Ms. McDanel testified that tantrums are the beginning level of communication for autistic children and as soon as they have a system to communicate, the tantrums decrease. ***Id.*, at 194.** They are allowed to use pictures or other methods to communicate their needs and then the behavior usually ceases. ***Id.*** "I rarely have anybody tantrumming, because academically, they're learning." ***Id.*** Tantrums are a sign, not that the child is lazy, but that he or she is sick, hungry, tired, or frustrated. ***Id.*, at 195.** She has never had a child functioning well enough to be mainstreamed into a regular classroom who also is having tantrums. ***Id.***

Ms. McDanel viewed a video of CM functioning in October 1996 in her private preschool. ***Id.*, at 191.** Based on her observations, the child was not functioning as independently as had been reported and she relied on her therapist for prompting. ***Id.*, at 192.** CM was not functioning as well as any child in Ms. McDanel's classroom in areas such as learning the day of the week, knowing what was going on during the day and interacting with others. ***Id.*** She was unable to sit in a small group or work on something without prompting. ***Id.*** During calendar time, she required constant prompting to refocus and she did not respond to other children even when they approached her. ***Id.***

Ms. McDanel was asked several questions about Dr. Blacher's reported observations of her classroom. Although Dr. Blacher reported several students engaged in self-

stimulatory behavior, Ms. McDanel testified that only one student, who was absent that day, engages in such behavior. ***Id.*, at 213.** One student who was described as having been removed from the room due to behavior problems was actually doing an independent work project outside the class at the time. ***Id.*, at 214.** Dr. Blacher reported that no one checked or monitored the students doing independent work; a description with which Ms. McDanel disagreed. ***Id.*** Although Ms. McDanel had invited questions from the doctor concerning the observation, she had none. ***Id.*, at 216.**

Ms. McDanel explained the progress she has seen in her current students. T began in her classroom when he was five years old and at the time was very confused, had tantrums, and could not focus. **Transcript, Vol. X, at 152-53.** She began by using pictures to show him what would happen during each portion of the day. ***Id.*** When he first came into the class, he had almost no language skills. ***Id.*** After working with him, he began to answer "yes" and "no" to questions and then expanded his answers. ***Id.*, at 154.** The second year in her classroom, he began to have spontaneous communication. ***Id.*** "He's able to answer anything. He's able to participate in a group setting in a first grade classroom of 1 8 kids and listen and answer questions." ***Id.*** He understands the questions and gives appropriate answers, not as a result of having practiced with her, but as a result of conceptualizing the language. ***Id.*** T has learned to generalize and in his second year with Ms. McDanel is mainstreamed into the first grade classroom. ***Id.*, at 35, 37.**

M first began with Ms. McDanel in the 1996 school year and at the time was nonverbal. ***Id.*, at 29.** She did not understand the routine of the classroom but picture schedules were designed for her. ***Id.*** She is now able to express her wants and needs and for the first time is **able to** carry on conversations. ***Id.*** She is also able to follow the classroom schedule. ***Id.***

B was originally labeled as learning disabled. ***Id.*, at 158.** He was evaluated at TEACCH and found to be autistic. ***Id.*, at 159.** He came into Ms. McDanel's classroom the previous year when he should have been in the fourth grade. ***Id.*** In March of that year, he began to move into a regular fourth grade classroom and this year, is in a regular fifth grade classroom. ***Id.*** Ms. McDanel feels that having a structured classroom allowed him to learn and become comfortable with oral instructions. ***Id.*** As a reward for his behavior in the regular classroom, he comes back to visit once each week for one hour. ***Id.***

S is academically at his grade level but he remains in Ms. McDanel's classroom because he easily becomes distracted. ***Id.*, at 45-46.** Because of his level of anxiety, he performs well in the structured classroom but would have trouble coping in a regular classroom. ***Id.*, at 46-47.** However, he has made great progress because at first he had difficulty in the structured classroom. ***Id.***

IV. CONCLUSIONS OF LAW

ALJ Phipps found that "[a]t its core, the dispute between the parties is a debate over a choice of educational methodology for the teaching of autistic children." **Final Decision, filed December 11, 1997.** She found the County had complied with all procedural and substantive matters required by the IDEA and had offered CM a FAPE. She also found that in order for CM to receive maximum educational benefits, her one-on-one aide should be trained in the Lovaas method of using discrete trial teaching to assist in the transition to the regular classroom. Her findings were affirmed by the SRO. **Decision, March 3, 1998.**

At oral argument, Plaintiffs' counsel said the issue for resolution in this case is whether the County is obligated to reimburse the Plaintiffs because they did not adopt the Lovaas program for CM. Plaintiffs' trial brief is a recitation of the superiority of the Lovaas program over the TEACCH

method. "This ease provides the opportunity to address issues related to CM and simultaneously resolve a number of global special education issues that are of concern to the Defendant and the State of North Carolina." **Plaintiffs' Trial Brief, filed August 12, 1999, at 8.** At the heart of Plaintiffs' contentions is a belief that CM was denied the Lovaas program because it would have been too expensive. That, however, is not the issue at hand.[13]the truth? **Plaintiffs' Trial Brief at 7, 11, 14.** Plaintiffs raise only three legal arguments: the County failed to comply with the procedural requirements of the IDEA because the ALJ and SRO issued their opinions beyond the time requirements; the IEP is vague and ambiguous; and the Plaintiffs are entitled to reimbursement for an aide trained in Lovaas therapy who would have accompanied CM had she been in the regular kindergarten class for the 1996-97 school year.

Federal regulations require that within *45* days after receipt of a request for a due process hearing, the state agency must provide the hearing and issue a final decision. **34 C.F.R. § 300.512(a).** When a request for a review of that decision is made, the SRO shall issue the decision within 30 days. **34 C.F.R. § 300.512(b).** Extensions of time may be granted by the hearing or review officer on the request of either party. **34 C.F.R. § 300.512(c).**

---

[13] The trial brief raises such issues as: the County did not initiate the Lovaas program because then it would have had to provide it to other children; "Maybe in this case we are confronted with the belief that this problem should not fall on the school districts at all;" how should funding be provided for Lovaas program; will the Court have the integrity to "serve its function of independently reviewing the case from a global perspective: since it "has already shown its ability to provide accolades for the TEACCH program;" this case should be the impetus for new legislation to support Lovaas in the state schools; the TEACCH program results in a lifetime of disability; a decision in favor of CM will motive school districts to lobby the legislature to provide Lovaas programming; "How many lives need to be ruined while we deny the truth? **Plaintiffs' Trial Brief at 7, 11, 14.**

On September 23, 1996, Plaintiffs were on notice that the County's proposed IEP did not meet their requirements. They argue, however, that had ALJ Phipps' decision been timely rendered within 30 days after the conclusion of the hearing in April 1997, CM would have been able to take advantage of a public school education for the 1997-98 school year. The same argument is made concerning SRO Walters' decision. This position is based on the premise that the Plaintiffs would have accepted the IEP as proposed with the implementation of Judge Phipps' suggestion that the aide to accompany CM in the regular classroom would be trained in the Lovaas methodology.

First, the undersigned is unable to conclude from the record that the decisions were in fact issued in an untimely manner because the proceedings were extended by the conduct of both parties. On November 1, 1996, Plaintiffs filed a petition for a contested hearing pursuant to the North Carolina Administrative Procedures Act, N.C. Gen. Stat. §§ 150B-1, *et. seq.*[14] **Petition, included in Official Record.** On that same date, Plaintiffs moved to consolidate findings by Judge Mann with this petition and on November 14, 1996, that request was granted and the matter was continued. **Order for Consolidation, filed November 14, 1996.** A consent order was filed on December 2, 1996, which set the hearing for March 3, 1997. **Response to Respondent's Motion to Continue, filed February 21, 1997.** On February 14, 1997, the County moved for partial summary judgment which was granted on March 24, 1997. **Order Granting Partial Summary Judgment, filed March 24, 1997.** Plaintiffs moved for reconsideration and sanctions. **Motions, filed March 11, 1997.** In February 1997, the County moved for a continuance of the hearing which was granted and the hearing was scheduled to begin on March 17,

---

[14] The state act provides for different mechanisms and time periods than the federal regulations. Because the undersigned finds the Plaintiffs have not been prejudiced in any event, the issue of waiver is not address.

1997. **Scheduling Order, filed March 14, 1997.** The hearings began on March 17 and concluded on April 16, 1997. Thus, any argument by Plaintiffs that the hearing did not occur in a timely manner is defeated by the extensions of time given both by consent and on motion.

The transcripts from the lengthy hearing were not completed until July 30, 1997. **Order, filed July 30, 1997.** The parties were given, in accordance with the North Carolina Administrative Procedures Act, until September 19, 1997, to submit proposed findings of fact and conclusions of law. ***Id.;* N.C. Cen. Stat. § 150B-36.** On November 19, 1997, Judge Phipps notified the parties she had reached a decision and requested the County's attorneys to submit revised findings of fact and conclusions of law. **Letter dated November 19, 1997 from Judge Pbipps to counsel.** The decision then issued on December 11, 1997.

Plaintiffs filed a request for review which was received in the office of the State Superintendent of Public Schools on December 20, 1997. **Letter from F. Lowell Harris to Dr. Joe D. Walters, dated January 12, 1998.** Dr. Joe Walters was appointed SRO on January 12, 1998. ***Id.*** On January 26, 1998, Dr. Walters notified the parties that the transcripts and records of the proceedings below had not yet been received and therefore, "without waiting for a request from either of the parties, the Review Officer hereby extends the time for completion of the review." **Request for Written Arguments and Extension of Time, dated January 26, 1998.** Written arguments were to be filed on or before February 19, 1998. ***Id.*** Within 30 days of the submission of those arguments, the SRO issued his decision. **Decision, filed March 3, 1998.**

Assuming *arguendo* that the decisions were not issued in compliance with the federal regulations, the undersigned concludes the Plaintiffs are not entitled to relief. The Fourth Circuit has

> previously held that the failure to comply with IDEA's procedural requirements, such as the notice provision, can be a sufficient basis for holding that a government entity has failed to provide a free appropriate public education. However, to the extent that the procedural violations did not actually interfere with the provision of a free appropriate public education, these violations are not sufficient to support a finding that an agency failed to provide a free appropriate public education.

***Gadsby by Gadsby v. Grastnick*, 109 F.3d 940, 956 (4th Cir. 1997) (citing *Hall by Hall v. Vance County Bd. of Educ.*, 774 F.2d 629, 635 (4th Cir. 1985)).** Plaintiffs' contention is that if the decisions had issued earlier, "the inability to resolve the key issue of the aide should have precluded the break down that resulted in CM being unable to attend Defendant's school for the 1997/98 and subsequent school years." **Trial Brief, at 16.** However, the Plaintiffs admitted that the only program they would have accepted was the Lovaas program and that is not what the IEP provided. Contrary to the assertion in the brief, this was not the only reason the Plaintiffs rejected the IEP. They were adamant that CM should not spend any portion of the day in the autistic classroom. They did not agree that if CM was experiencing tantrums in the regular classroom she should be returned to the TEACCH classroom until she had progressed sufficiently to handle the distraction of the regular class. And, they insisted that CM be instructed only by use of the discrete trial teaching method to the exclusion of TEACCH methods and receive such instruction 15 to 20 hours per week. Moreover, they insisted that her shadow in the regular classroom be the same person all the time which was contrary to the IEP's goal of having CM become less dependent on one person. Thus, whether they had known

that ALJ Phipps would have recommended a Lovaas trained aide to be with CM while she was in the regular classroom is of no moment. They rejected not simply the lack of a Lovaas shadow but the fact that Ms. McDanel would have used TEACCH methods in a TEACCH classroom with one-on-one instruction which would occur for fewer hours per week than the Plaintiffs wanted.

Thus, even if there were procedural violations, they did not actually interfere with CM's receiving a FAPE education. ***Gadsby, supra.***

Plaintiffs argue the 1996-97 IEP was so vague and ambiguous that it violated IDEA's procedural requirements for the development of an educational plan. They claim it is impossible to ascertain where within the school the services would be provided, whether CM would be placed in a kindergarten or first grade class, who would be providing the services and at what times and places.

IDEA provides that an IEP means a written statement for the child developed at a meeting with the school officials and the parents which shall include a statement of the child's present levels of educational performance, a statement of annual goals and "a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs." **20 U.S.C. § 1401(a)(20).** Here, the IEP specified that CM would receive 12.5 hours per week of one-on-one and guided instruction with 3 hours of speech services occurring in the TEACCH classroom. **Respondent's Exhibit 10, at 1, 2, 5.** It specified that she would be in a regular kindergarten class for library, music, art, lunch, assemblies, physical education, recess, centers, circles, free play and snack accompanied at all times by a teacher or aide and set forth the percentage of the time to be spent there. ***Id.*, at 2.** It was signed by both the TEACCH teacher, Ms. McDanel, and the kindergarten teacher, Michele Alexander. ***Id., at* 5.** Throughout the discussion of goals for CM references are made to instruction in the regular

classroom versus the TEACCH classroom. Moreover, during the meeting with the Plaintiffs on September 23, 1996, these matters were fully discussed and explained. ***Brett* K, *supra*, at **10-11 (quoting *Lenn v. Portland Sch. Comm.*, 998 F.2d 1083, 1086 (1st Cir. 1993) (IDEA requires "an adequate, rather than an optimal, IEP" and noting parents' agreement at IEP development meeting that the goals were appropriate)); *Doe by and through Doe* v. *Defendant I*, 898 F.2d 1186, 1190-91 (6th Cir. 1990) (where the information claimed to be absent from the IEP was known to all parties, technical violation harmless); *J.S.K. by and through J.K. v. Iiendry County Sc/a. Rd.*, 941 F.2d 1563, 1571 (11th Cir. 1991) (argument that IEP failed to include teacher's day-to-day activities and thus, ambiguous, rejected).**

Plaintiffs' final contention is that they prevailed below because the ALJ and SRO determined that CM should be accompanied by a Lovaas trained aide while she was in the regular kindergarten class. As a result, they seek reimbursement for the cost of having their Lovaas therapist available to CM in her private school during the 1996-97 school year. However, reimbursement would be proper only if the County failed to offer CM a FAPE. ***Burlington v. Dept. of Educ.*, 471 U.S. 359, 372-74 (1985); *Sellers*, 141 F.3d at 526.** Thus, the issue is not whether the Plaintiffs prevailed, but whether the 1996-97 IEP as offered would have provided a FAPE.[15]

It is first noted that both theALJand SRO found the IEP as drafted was appropriate.

---

[15] The Court concludes that by raising this argument Plaintiffs have conceded that the IEP as modified by the use of a Lovaas trained aide would have provided a FAPE.

> [T]he IDFA[] recogni[zcs] that federal courts cannot run local schools. Local educators deserve latitude in determining the individualized education program most appropriate for a disabled child. The IDEA does not deprive these educators of the right to apply their professional judgment. Rather it establishes a "basic floor of opportunity" for every handicapped child. States must provide specialized instruction and related services "sufficient to confer some educational benefit upon the handicapped child," but the **Act does not require "the furnishing** of every special service necessary to maximize each handicapped child's potential."

***Hartmann*, 118 F.3d at 1001 (quoting *Rowley*, 458 U.S. at 199, 201).**

ALJ Phipps ruled that the proposed IEP for the 1996-97 school year "was appropriate, however, in order for the IEP to provide the maximum educational benefit to her" the aide should be trained in the Lovaas method. **Decision, *supra.*** This went beyond what was required under the statute. Nonetheless, the educational placement must be "likely to produce progress, not regression or trivial educational advance." ***Hall by Hall*, 774 F.2d at 636.**

The sequence of events occurring from the fall of 1995 through the spring of 1997 show that the County offered a FAPE. In fact, it may well be that the education offered by the County would have benefitted CM far more than continued Lovaas therapy. Contrary to the Plaintiffs' contention that placement of CM in the TEACCH classroom would have caused her to regress, CM's behavior regressed from 1995 through 1997 while she was in Lovaas therapy. And, in the fall of 1996 she exhibited negative behaviors not previously shown, *i.e.*, biting and hair-pulling.

In the spring of 1996, Ms. Dilworth reported to CM's mother they were in danger of being expelled from school because of CM's behavior. Yet, Plaintiffs failed to disclose this regression to any expert or to the County.

The County's experts and teachers noted the intensity of concentration of the Lovaas program on behavior modification and rote learning to the exclusion of developing spontaneous language skills. Ms. McDanel noted that when CM began to play and use spontaneous language during breaks, she was pulled back into therapy. She described CM as a child who was not enjoying herself. The Plaintiffs' experts admitted that at this point, CM no longer needed 40 hours per week of Lovaas therapy. Dr. Blacher said 40 hours was too much; CM should be in a classroom setting. Dr. Boyle recommended between 15 and 20 hours per week of one-on-one instruction, not specifying Lovaas therapy. Ms. Dilworth admitted that CM had become dependent on her and in the spring of 1997 had to be prompted repeatedly.

All of the experts testified that autistic children engage in inappropriate behavior as a means of communicating that something is wrong; *i.e.*, the child is tired, frustrated, sick, hungry, or having too much expected of her. CM's mother described her in the fall of 1996 as having become lazy and having forgotten what she had learned. During the same time, CM's behavior deteriorated. Ms. McDanel testified that autistic children do not engage in behavior problems because they are lazy but because something is wrong which they are unable to communicate. The behavior itself is the beginning of communication and the teacher must use pictures to help the child express herself. As soon as the child is able to communicate, the behavior improves. Yet three years into the program, CM's parents continued to enforce the Lovaas therapy which focused on behavior modification or "extinction" despite the fact that CM's behavior was regressing. What the Court is compelled to note is that by 1997 when she was seven years old, CM had been literally working approximately 40 hours

per week since the age of three without any time to simply be a child. Her behavior regression is therefore, according to the experts, not surprising.

Plaintiffs strenuously objected to CM having any time in the autistic classroom out of fear she might learn inappropriate behavior. This argument is disingenuous in view of CM's deteriorating behavior during the same time frame. Moreover, it was to her detriment. Ms. Dilworth testified to numerous occasions when CM's classmates in the private school witnessed her tantrums, to the point that it impacted her socialization. On one occasion, CM tantrummed for ten minutes in front of her peers. The damage done to her self-image and ability to socialize by these incidents seems far greater than any experience she would have had in Ms. McDanel's classroom. In addition, the Plaintiffs felt it essential that CM have an aide available to her at all times. This was a primary reason for rejecting the IEP because there was no guarantee that the same person would always be in the regular classroom with CM. Yet, Ms. Dilworth testified that she worked with other children at CM's private school. Indeed, the reason CM's classmates witnessed one of her tantrums was because Ms. Dilworth had been left in charge of the class and therefore could not leave to remove CM.

The County's teachers and experts testified that, first and foremost, autistic children need a structured environment in which they feel secure before learning is imposed on them. And, once this is accomplished, independence is the ultimate goal so that the child can function in the real world. The IEP was designed to give CM the opportunity to do both: she would be in the structured classroom or a room adjacent thereto for academic one-on-one instruction and she would have time in a regular classroom with an aide for socialization and communication skills.

Ms. Dilworth testified that by the spring of 1997, CM had to be removed from her private school classroom for any academic work to be accomplished. CM would not listen to

stories read by her teacher; but when Ms. Dilworth read them, CM could answer questions. By all accounts, CM was not becoming independent but rather more dependent on her therapist.

Moreover, Dr. Boyle's testing in February 1997 showed that CM was not making the dramatic progress that her parents reported. Although her IQ scores increased some, her language and communication skills had not improved significantly and she still was unable to generalize that which she had learned. Dr. Boyle reported CM as having significant expressive and receptive language skills. He reported her as mildly retarded and depending on rote memorization rather than generalizing learning.

These findings corroborated those of the County's experts and teachers. Consistently, the school authorities could not find objective evidence of the progress which the Plaintiffs claimed on CM's behalf. The skills reported to have been mastered were not recognized by her private preschool teachers, individuals who had absolutely no stake in the litigation. And, the reports of Dr. Shea, Ms. Forst, and Ms. McDanel echoed Dr. Boyle's conclusion that CM remained unable to generalize the skills learned in therapy beyond that setting.

Yet while CM remained at Covenant Academy with a teacher her therapist described as below average, Ms. McDanel's children made progress in the TEACCH classroom. M went from being completely nonverbal to having the ability to express her needs and wants. T was mainstreamed into the first grade and receiving one-on-one instruction. B had gone in less than a year from the TEACCH classroom into a regular classroom.

Of course, there is no evidence that CM would have prospered in the TEACCH setting because she has yet to be exposed to it. However, it is clear that the Plaintiffs have, understandably, acted with some sense of desperation in connection with their child's condition. After three months in the TEACCH program in 1993, they removed CM for the

Lovaas therapy, a program described as achieving recovery before kindergarten. When CM was placed in a private preschool, no one was told she was autistic. Dr. Boyle was instructed to remove her IQ from his evaluation for the school. And, the Plaintiffs never told anyone evaluating CM that she was experiencing behavior problems. Nonetheless, the County did everything within reasonable limits to accommodate the Plaintiffs' desires for their child's education. In 1994, they offered to provide services in CM's private preschool. They provided speech services throughout free of charge. The Plaintiffs were reimbursed the sum of $1,200 in connection with Dr. Handleman's evaluation, a report which ultimately was useless. The County allowed the Plaintiffs to use Dr. Boyle's services instead of having certain tests readministered by the school authorities. Finally, in the third meeting for the 1996-97 school year, the County basically offered the Plaintiffs everything they had requested: CM would go into a regular classroom despite Ms. McDanel's misgiving that she could handle the size of the class. She would receive one-on-one and guided instruction for a total of ***12.5*** hours per week, a figure close to the 15 hours suggested by Dr. Boyle. Her speech services would be increased. And, an aide would accompany CM at all times while she was in the kindergarten class.

"The IDEA does not promise perfect solutions to the vexing problems posed by the existence of learning disabilities in children and adolescents. The Act sets more modest goals: it emphasizes an appropriate, rather than an ideal, education. . . . " ***Lenn*, 998 F.2d at 1086.** "The IDEA does not require, however, that a school system fund the best possible placement for a child. 'The [IDEA] requires only that the child be able to benefit from the instruction that [she] receives, not that [she] be able to maximize [her] potential commensurate with the opportunity provided nonhandicapped children.'" ***Brett K, supra*, at **14 (quoting *Denton*, 895 F.2d at 980).** Nor does the IDEA create a cause of action for educational malpractice. ***Sellers*,**

141 F.3d at 527. The fact that the Lovaas program may be better than TEACCH or provide the maximum opportunity for CM's development does not mean that the IEP offered would not have provided a FAPE.

The undersigned finds the Plaintiffs have failed to carry their burden of establishing a violation of the IDEA. The preponderance of the evidence supports the findings of fact and conclusions of law of theALJand SRO.[16]

Plaintiffs also alleged a claim pursuant to NC. Gen. Stat. § 1 l5C-106(b) which provides in pertinent part that it is "policy of the State [] to provide a free appropriate publicly supported education to every child with special needs. The purpose of this Article is to... bring State law, regulations and practice into conformity with relevant federal law." The language of the statute indicates that the standard for such an education should the same as the federal standard under the IDEA. However, "North Carolina apparently does require more than the [IDEA]. The special education program must provide the child with an equal opportunity to learn if that is reasonably possible, ensuring that the child has an opportunity to reach her full potential commensurate with the opportunity given other children." ***Burke County,* 895 F.2d at 983.** Nonetheless, this higher standard does not require a school district to develop a "utopian educational program" for the student with special needs any more so than would be required if the student were not handicapped. ***Harrell v. Wilson County Sch.,* 58 N.C. App. 260, 293 S.E.2d 687 (1982).** To the extent reasonably possible, the student with special needs should be given an equal opportunity to learn. ***Id.*** For the reasons stated *infra,* the Court finds the decisions of the ALJ and SRO supported by a preponderance of the evidence and the Plaintiffs were offered an educational program which would have provided

---

[16] The Court has considered arguments raised below but not addressed in the Plaintiffs' brief and finds the decisions below supported by a preponderance of the evidence.

CM an equal opportunity to reach her full potential commensurate with the opportunity given other children.

V. ORDER

IT IS, THEREFORE, ORDERED that this action be dismissed by way of Judgment filed herewith.

THIS the 12th day of October, 1999.

\s\

LACY H. THORNBURG
UNITED STATES DISTRICT COURT JUDGE

27 IDELR 435

Henderson County Pub. Schs.

State Educational Agency

Entered: December 11, 1997

North Carolina

Henderson County Public Schools

No. 96 EDC 0766, 1708

ID45.003 • Autism, Educational Methodologies

ID200.040 • Free Appropriate Public Education (FAPE), Reasonably
Calculated to Provide FAPE

ID285.005 • Least Restrictive Environment (LRE), Autism

ID365.015 • Placement, Autism

ID410.005 • Reimbursement to Parents, In General

Summary

For the 1996-97 school year, a school district and the parents of a 7-year-old student with autism agreed on the student's IEP goals and objectives but disagreed about the appropriate placement for her. The parents wanted the district to fund the student's current in-home Lovaas program, which she had been participating in for several years, and the district proposed placing the student in a regular education kindergarten class for half of the day with

the assistance of a 1:1 aide, one hour per day in an autism classroom, and 1.5 hours a day of one-on-one academic instruction. The proposed district program utilized the TEACCH method of instructing students with autism. The parents requested a due process hearing, seeking reimbursement for the costs of the student's Lovaas program since 1993. The administrative law judge granted the district's motion for summary judgment on all of the parents' claims for reimbursement except for the 1996-97 school year. Currently before the ALJ was the appropriateness of the district's proposed placement.

HELD: for the district.

The administrative law judge determined the district placement, with one modification, was appropriate for the student, as it was designed to allow her to make educational progress in the LRE. The proposed district program addressed the student's needs for 1:1 instruction, speech services, and the development of communication and interpersonal skills. The district placement also provided the student with opportunities for mainstreaming with regular education students. The ALJ noted that the student appeared to have made little progress in the Lovaas program, and the Lovaas program did not address the student's need for the development of functional language and independent living skills. The in-home Lovaas program was also too restrictive for the student. The student's negative behaviors were increasing, instead of decreasing. Accordingly, the proposed district program was appropriate. The ALJ determined the student required a 1:1 aide with Lovaas training during the transition from the in-home program to the district program, and the district was ordered to include this service in the student's IEP. The parents' request for reimbursement was denied.

Administrative Law Judge: Meg Scott Phipps.

Issue

1. Whether respondent offered [] free appropriate education during the 1996-97 school year which was reasonably calculated to allow her to make educational progress.

Reference Abbreviations

T--Transcript of Hearing

I-XIX--Volumes of Transcript

p(p)--Page(s)

Resp--Respondent

Pet--Petitioners

Exh--Exhibit

Based upon the greater weight of the evidence presented at the hearing in this contested case, the undersigned makes the following:

Findings of Fact

1. Petitioners [] and [] are the parents of [], a seven-year-old with autism who is entitled to services as a special needs student in respondent's schools. Respondent, Craven County Board of Education, is a local educational receiving monies pursuant to the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 et seq.

2. Upon a motion by respondent, this court, by decision of Chief Judge Julian Mann, granted summary judgment for respondent on all of Petitioners' procedural and substantive claims prior to the development of the 1996-97 IEP and denied Petitioners' claim for additional reimbursement for the independent evaluation. The only claim remaining for adjudication in this contested case is Petitioners' claim regarding the 1996-97 IEP. Petitioners had also filed a claim in July 1996 for full reimbursement of an independent evaluation, above and beyond the $1200.00 that had been paid by respondent.

3. Petitioners filed a petition for a contested case hearing in the Office of Administrative Hearings on November 1, 1996, alleging that the educational program offered by respondent to [] for the 1996-97 school year was inappropriate. Petitioners sought reimbursement by the school system of their chosen educational program, the Lovaas method, from November 1993 to the present.

4. [] was diagnosed with autism at approximately age two. During the 1992-93 school year, [] attended a Montessori preschool in New Hampshire three days a week for three hours a day. She was accompanied to the class by an assistant who was not trained in autism. (T.IV, p. 86). [] did not display any aggressive behaviors in class (T.IV, p. 99).

5. Mr. William White, a psychologist with experience in autism who was hired by the []s, consulted monthly with the staff at the Montessori school to discuss []'s autism and assist in her educational programming. (T.II, p. 16).

6. The []s moved to Hendersonville, North Carolina in June 1993 in order to take advantage of services from the Treatment and Education of Autistic and Related Communication Handicapped Children ("TEACCH")

program. (T.III, p. 13). The []s learned of the TEACCH program by attending conferences on autism and researching available programs. (T.II p. 20-21). They moved based on their understanding that TEACCH is a nationally known program for autistic students and their families. (T.VI, p. 68).

7. The TEACCH program, begun with support of the state legislature in 1972, is a comprehensive system that provides treatment, education and support for autistic children, adults and their families. TEACCH provides evaluations and consultation to school systems throughout North Carolina, the U.S. and the world. (T.XIX, pp. 19-40).

8. The TEACCH philosophy focuses on using meaningful routines and visual clarity to teach autistic individuals to function independently. Through the use of structure and clarity, the autistic person is taught to understand concepts, work skills and expectations. The skills that are learned at the pre-school level are built upon as the individual with autism grows older, leading to greater independence and adaptability in the classroom, home setting, group home, vocational or supported employment settings. The TEACCH approach focuses on the student's strengths and on what children with autism personally find motivating or interesting and utilizes these in a creative manner to teach new skills. (Resp. Exh. 73).

9. In July 1993 [] was evaluated by Sloan Burgess at the TEACCH center in Asheville, North Carolina. (Resp. Exh. 46). Sloan Burgess testified to her extensive experience working with individuals with autism. She has been employed by TEACCH since 1991 as a special education specialist. In that role she conducts diagnostic evaluations, provides consultation to school systems, provides parent and professional training and organizes and conducts support groups for families. (T.XVIII, p. 6).

10. Ms. Burgess testified that during the July 1993 testing [] showed areas of substantial deficit in social relatedness. (T.XVIII, p. 14). She displayed no functional language except for the word "no" but she babbled throughout the evaluation. (T.XVIII, p. 13).

11. In August 1993, the []s along with Sloan Burgess met with Henderson County school personnel to develop an IEP for []. (Resp. Exh. 2). The []s, Ms. Burgess and school personnel agreed that [] should be served in the TEACCH preschool classroom which was just being developed at the Helping Hand Center. []'s IEP called for her to be in a full day program specially designed for students with autism. (Resp. Exh. 2). This was the first time [] had been placed in a class specially designed for autistic students. The IEP also called for two half-hour sessions of speech therapy weekly. (Resp. Exh. 2).

12. William White also advocated placement of [] in the Helping Hand TEACCH class. In a consultation report provided to school personnel in August 1993, Mr. White stated "it is very important to note that [] needs plenty of time to learn about her educational environment. At first staff should follow her lead and capitalize on the few teachable moments she gives you; then increase your expectation level as she becomes more comfortable." (Resp. Exh. 43). The report also noted that Mr. White "felt quite strongly" that "[] can develop verbal communication." (T.IV, p. 103) (Resp. Exh. 43). He advocated the use of picture schedule boards, choice boards, verbal modeling and the use of sign language. (T.IV, p. 102). All of these suggestions were incorporated into []'s IEP. (Resp. Exh. 2).

13. Faye Arlege, the teacher in the Helping Hand classroom, and Sloan Burgess, who provided consultation to the classroom, testified that [] made good progress during the short time period she was enrolled in the class. (T.XI, p. 17).

They indicated that [] learned how to work on a specific task by sitting at a table, attending to the task and manipulating the materials. (T.XI, p. 19).

14. Although []'s IEP called for a full-day program, [] only brought [] for half day for most of the time she was enrolled. (T.XI, p. 15).

15. Ms. Arledge testified that a typical class day involved group time and individualized instruction for each student. (T.XI, p. 13-14). She had a program of reverse mainstreaming (T.XI, p. 69) and two of her students also were mainstreamed for short periods of time each day. Ms. Arledge and Ms. Burgess testified that in their opinion mainstreaming was not appropriate for [] at the beginning of the school year but it would have been an option later in the year if she gained enough skills to make it appropriate. (T.XI, p. 21-22).

16. Faye Arlege and Sloan Burgess testified that [] did not have significant behavioral problems while in the Helping Hand classroom. (T-XI, p. 22). The speech-language IEP drafted for [] from 1/94-1/95 states in present level of performance that [] "does not display aggressive behaviors. Responds well to structure and routine." (Resp. Exh. 3).

17. [] testified that she learned of the Lovaas program in October 1993 by reading a book by Catherine Maurice in which Ms. Maurice recounts the "recovery" of her two children from autism. After reading the book, in mid-October 1993, [] contacted UCLA and arranged for the Ann Maxwell from the Chicago Program to conduct a Lovaas training workshop. (T.IV, p. 128). The workshop was scheduled for December 1993.

18. The Lovaas program is described in the program literature as a "treatment" approach "that specializes in

helping pre-school children who are autistic and/or mildly to moderately retarded." (R. Exh. 184). The program uses behavioral techniques derived from the research of Dr. Ivar Lovaas of the UCLA Psychology Department conducted in the 1970's. (P. Exh. 7, p. 81). The Lovaas research claimed that 47% of the 19 subjects in his study achieved "normal educational and intellectual functioning by 7 years of age." (Id.). The program emphasizes "discrete-trial teaching," involving the use of repeated verbal prompts to elicit specific verbal or behavioral responses. Positive reinforcers such as candy, tickles and verbal praise are used to reward correct responses, "contingent aversive NO's" spoken in a loud voice are used as negative reinforcers. (R. Exhs. 184; 73). Other negative consequences are delivered for unacceptable behavior.

19. Dr. Lovaas has established a for-profit center to provide Lovaas "workshops," "designed to help families set up treatment programs of their own." (R. Exh. 184, p. 4). Through the workshops, parents and staff members (recruited by the parents) are trained in the Lovaas method. Staff members are referred to as "therapists." They do not require any special credentials or previous experience to be qualified to be therapists. The Lovaas Clinic recommends dependable college students as good candidates. In addition to training the staff, the Lovaas program provides a UCLA consultant who visits the home site quarterly to monitor and advise regarding the program. The consultants may be graduate students or recent college graduates who have worked in the Clinic. (R. Exh. 184).

20. On November 23, 1993, the []s removed [] from the Helping Hand classroom. In a letter of that date to Candy Priest, supervisor for Exceptional Children's program for the Henderson County Schools, [] indicated his two reasons for removing [] were the published results of studies that the behavioral (Lovaas) approach is highly successful and the []s

belief that the Montessori classroom was the best placement for []. He did not express any discontent with the TEACCH program. (Resp. Exh. 72).

21. Dr. Lee Marcus, the Clinical Director of the Chapel Hill TEACCH Center, testified that three months of education in the TEACCH classroom was not a sufficient amount of time to judge the success of program in light of her age and her lack of prior enrollment in a structured classroom for students with autism. (T.XIX, p. 191-192).

22. Although [] was no longer receiving special education services from the respondent's schools, respondent agreed to continue to provide [] speech language services even though not required to according to the Department of Public Instruction. (T.XI, p. 132). In January 1994, an IEP meeting was held to develop a new speech IEP for [] and her speech service time was increased to two hours a week. (T.XI, p.133).

23. On December 21, 1993, the []s began implementing the Lovaas program with [] for 20 hours a week. (T.IV, p. 153). [] testified that she knew the Lovaas program was working for [] because she went from being nonverbal to using words within the first months of the program. She testified that [] was unable "to imitate a single thing" or to repeat any words "on command" prior to starting Lovaas. (T.VI, p. 31). However, the speech records of Karen Perella show that [] was able to both imitate motions and to say certain words in October and November 1993. (Resp. Exh. 174). Ms. Perella testified that []'s language was emerging at that time prior to her beginning the Lovaas program. (T.XV, p. 217). Sloan Burgess testified that []'s lack of spontaneous language was not an area of concern for her since [] had prerequisite skills which suggested her language and communication would develop over time. (T.XVIII, p. 22-23). Dr. Marcus also testified that [] showed early

indicators that she was likely to develop speech, given her non-verbal IQ score, echolalia and good early services. (T.XIX, p. 115-118).

24. In August 1994, the []s began working with the UCLA Lovaas program. (T.IV, p. 164). []'s therapy was increased to 40 hours a week and her amount of time in school decreased. [] met with Candy Priest and requested a copy of []'s student records. At that time, Ms. Priest informed [] that the school system could provide special education services to [] at her private school. (T.XI, p. 144). [] declined the offer indicating that he and his wife did not want the private school to know that [] had autism. (T.XI, p. 144).

25. In December 1994, [] contacted Candy Priest to request that the school system begin paying for the Lovaas program. (T.XI, p. 144-145). Ms. Priest indicated that it would be necessary for the []s and school personnel to meet to discuss []'s educational needs and to determine an appropriate educational placement for her. (T.XI, p. 144-145). In January and February 1995 the []s and school personnel held a series of meetings to develop an IEP for []. (T.XI, p. 145-146).

26. While in the process of developing the IEP, Judy Cook, the Director of Exceptional Children's Programs, and Sharon Burlingame, a special education teacher, visited the home to observe the use of Lovaas therapy with []. (T.VI, p. 145) (Resp. Exh. 171). Judy Cook testified that [] appeared very tired during the therapy and hit herself in the face several times out of apparent frustration and weariness. (T.IX, p. 80-82).

27. On February 15, 1995, a final IEP meeting was held. At that time, the school-based committee considered four possible programs for []: the Helping Hand Classroom, Sharon Burlingame's classroom, the TEACCH classroom at

Bruce Drysdale school and the Lovaas program. (T.VI, p. 196-97). The committee recommended that [] be placed in a full-day program for autistic students at Bruce Drysdale school with some mainstreaming in a regular kindergarten classroom. (T.VI, p. 197). The []s continued to request that the school system pay for the Lovaas program. Judy Cook indicated in the meeting that it was her belief that the Lovaas program was too restrictive for [] and that the program offered by the school system was more appropriate. (T.VI, p. 203) (T.VIII, p. 84). The []'s pointed to the Lovaas study and indicated that unless the school system could provide comparable data showing 47% of the students becoming indistinguishable from regular education students then they felt the Lovaas program was the best option. (Pet. Exh. 56).

28. The next day, Judy Cook sent the []s a letter again detailing the rationale behind the school-based committee's decision. (Resp. Exh. 78). Mrs. Cook enclosed a Parent's Rights Handbook and explained in the letter that the []s could pursue a due process hearing in light of their disagreement with the school system's offer of services. (Resp. Exh. 78) (T.VI. p. 203-204).

29. Although the []s initially indicated in the spring of 1995 that they would like to pursue mediation with the school system over the placement decision, in May 1995 the []s wrote to Judy Cook and stated that they had obtained representation by the Governor's Advocacy Council and that they were not available for mediation. (Resp. Exh. 84). The []s never pursued mediation after that point.

30. At the end of June 1995, the []s requested that the school system pay for an independent educational evaluation of [] (T.IX, p. 8). Because the most recent evaluation of [] was at that point over a year and a half old, Judy Cook requested that the school system be allowed to test [] first and that the []s could obtain an independent evaluation if

they disagreed with the results of the school system's evaluation. (T.IX, p. 8-9).

31. An evaluation of [] was conducted by school personnel in August and September 1995. (T.VIII, p. 219-220). In October 1995 the []s and school personnel met to review the results of the evaluation. (T.IX, p. 9). [] requested that one portion of the testing be readministered, and it was redone although the results did not markedly change. (T.IX, p. 10).

32. Because []'s February 1995 IEP was to expire in January 1996, school personnel invited the []s to meet in November 1995 to begin developing an IEP for the 1996-97 year. (T.IX, p. 11). A school-based committee meeting was held in November and at that time school personnel presented to the []s a draft IEP to begin the discussions. (T.IX, p. 10). The []s stated that [] had already mastered many of the proposed goals and objectives. (T.IX, p. 12). Some time after the meeting, the []s provided school personnel with a copy of the draft IEP that had been reviewed by Michael Guiou, their UCLA Lovaas consultant, and on which Mr. Guiou indicated many areas that [] had "mastered." (T.IX, p. 11) (Resp. Exh. 9).

33. In December 1995 the []s renewed their request for an independent educational evaluation stating that the evaluation conducted by school personnel was insufficient. (T.IX, p. 12). Judy Cook replied that the []s could pursue an independent evaluation and they would be reimbursed up to $1200 (the school system's maximum amount for independent evaluations). (Resp. Exh. 119).

34. The []s and school personnel jointly agreed to postpone the development of []'s full IEP for the 1996-97 year until the independent evaluation was completed. (Resp. Exh. 7, 115). []'s speech therapy IEP was reviewed in

January 1996 and services continued to be provided by respondent. (Resp. Exh. 4).

35. In January 1996, long before the independent evaluation was complete, [] wrote to Michael Guiou and stated that [] "will be attending a small private school next year with eight or nine children" and that the teacher of the class would be working with [] over the summer. (Resp. Exh. 189).

36. In March 1996, Dr. Jan Handleman, an educator and professor in New Jersey, conducted an assessment of []. (Resp. Exh. 57). His assessment consisted of a []'s file and a videotape provided by the []'s and an observation of [] working with her Lovaas therapist. (T.V, pp. 41-42). Dr. Handleman conducted no formal testing of []. The evaluation was provided to school personnel in early April 1996. (T.VIII, p. 222).

37. Dr. Handleman's report provided no information on []'s present level of educational performance, a necessary element for the development of an IEP. (T.VIII, pp. 223-225) (T.IX, pp. 12-13). Because the parents and their Lovaas consultant, Mr. Guiou, had both indicated that [] had mastered many of the draft goals and objectives on the proposed IEP, Judy Cook testified that she was concerned that Dr. Handleman's report was not sufficient to assist in IEP development. (T.VIII, p. 224). As a result, Judy Cook, sought the assistance of Dr. Victoria Shea, an expert in autism, to informally assess [] in order to provide information for IEP development. (T.VIII, p. 225).

38. The []'s agreed to Dr. Shea's involvement. Dr. Shea reviewed all of the records available on [] and observed [] in her home program and at her private school on May 20, 1996. (T.XVIII, p. 254). Dr. Shea also observed in Ms. McDanel's and Ms. Arledge's classrooms. Dr. Shea noted

that [] was very compliant during the observation period but that she became quite confused when she was not given prompts. [] did not initiate any contact with her peers during the observation period at school. (Resp. Exh. 58).

39. Dr. Shea completed her observation report on May 30, 1996, and recommended that IEP goals be written in several specific areas for []. (Resp. Exh. 58). In particular, Dr. Shea indicated that [] needed work in developing independence and functional language. It appeared to Dr. Shea that [] had memorized language but was unable to use language functionally in many cases. (T. XVIII, pp. 199-200). She also recommended development of self-help skills and academics. (T.XVIII, pp. 220) (Resp. Exh. 58).

40. Dr. Shea's report noted and she testified that although Mr. Guiou and the []'s indicated that [] had mastered numerous skills on the proposed IEP, [] was not able to perform those skills when Dr. Shea observed her. (Resp. Exh. 58). In light of the conflicting information regarding []'s ability levels, Dr. Shea advised that [] should be given more assessments to gauge her present level of functioning. (Resp. Exh. 58).

41. The evidence showed that the skills that Mr. Guiou and Mrs. Miller claimed [] had "mastered" in February of 1996, were not mastered in the school environment as documented by []'s teachers at the preschool. (Resp. Exh. 9); (Resp. Exh. 194). The teachers, responding to a questionnaire from [], noted that many of the goals which had been proposed for []'s IEP in November 1995 were either not attained or emerging by May 1996. (Resp. Exh. 194). Dr. Shea testified that Mr. Guiou's report of []'s mastery was not reliable. The evidence also showed that the skills claimed as "mastered" by [] at the time of the hearing, were not "mastered" in the school environment or across all settings but rather only mastered, according to her testimony,

in the one-on-one therapy environment. (T.V, p. 76-77). Judy Cook testified that these inconsistencies caused the school system to question the evaluation information being provided by the []s and it became important for school personnel to do additional observations or informal assessments of []. (T.IX, pp. 20).

42. On May 29, 1996, Laurie McDanel and Janna Forst visited the []s home in order to observe [] in her Lovaas program. (T.V, p. 73) (Resp. Exh. 59). The purpose of the visit was to gather more information on []'s present level of performance for the IEP development. Ms. McDanel testified that when she and Ms. Forst entered []'s therapy room, [] did not look up or acknowledge their presence. (T.X, p. 169). She noted that the therapy appeared to elicit information from []'s rote memory, rather than eliciting spontaneous communication. (T.X, p. 185). As a professional educator, Ms. McDanel believed the therapy to be too intense in light of the limited amount that [] was able to do during the time period. (T.X, p. 185).

43. In order to follow up on the visit, Ms. McDanel met again with [] prior to the IEP meeting to again discuss []'s present level of performance and her needs. (T.X, p. 186). This information was used in developing the IEP. (T.V, pp. 73-74).

44. An IEP meeting was scheduled for June 5, 1996, and following Dr. Shea's recommendation, Judy Cook requested that a teacher administer the Brigance test with [] prior to the meeting so that the IEP committee would have more information on []'s current level of academic functioning. (T.IX, pp. 20-22). The []s would not agree to the administration of the Brigance by school personnel and instead stated that they would have it done privately and requested that the IEP meeting be rescheduled. (T.V, pp. 43-45).

45. In late July 1996, the []s took [] to be evaluated by Dr. Thomas Boyle, a private psychologist in New Jersey who had worked with Dr. Lovaas. (T.V, p. 48). Dr. Boyle conducted intelligence and achievement testing with []. (Resp. Exh. 60). Dr. Boyle admitted in his report and in his testimony that he deviated from standard administration of the tests in several areas in order to try to elicit responses from []. (Resp. Exh. 60). He also acknowledged that these deviations from the norms could have resulted in inflating []'s scores on the testing. (T.XV, pp. 72-73). At the parents' request Dr. Boyle did not report []'s IQ score in his evaluation report. (T.XV, pp. 51). Her IQ placed her in the mildly mentally handicapped range. (T.XV, p. 113). Her achievement scores indicated that she was functioning at the beginning kindergarten level in math and reading. (T.XV, pp. 50). Dr. Boyle testified that [] needed lots of prompting during the testing and that sometimes he had to reword questions to elicit responses from her. (T.XV, p. 75-76).

46. Dr. Boyle's report recommended continuation of the Lovaas program with [] including 15-20 hours of one-on-one discrete trial teaching. (Resp. Exh. 60). Dr. Boyle admitted in his testimony that it was not proper to make a placement recommendation for a student based solely on testing results, nonetheless, he based his recommendations for placement in the Lovaas program solely on his evaluation results. (T.XV, p. 70) Dr. Shea testified that there was nothing in Dr. Boyle's testing results which would lead to the conclusion that [] needed discrete trial teaching or 15-20 hours of one-on-one. (T.XVIII, p. 232).

47. The []s also hired Dr. Jan Blacher, an education professor from California, to visit the classrooms for autistic students in Henderson County and to observe [] in her home program. (T.V, p. 67). Dr. Blacher testified that her area of expertise is not autism. (T.VIII, pp. 36-37). In her

correspondence with the parents and prior to visiting the school system or having any contact with [], Dr. Blacher stated that she would do everything she could to assist them in getting funding for their home program. (Pet. Volume 1, Exh. 2. BS 8817-8818). Dr. Blacher visited the classrooms in August 1996; however, none of the opinions or information gathered in Dr. Blacher's visit were shared with school personnel during the IEP development process in August and September 1996. (T.V, p. 71).

48. Dr. Boyle's report was provided to school personnel in early August (T.IX, p. 27). Ms. Cook testified that in her 15 years of experience reviewing evaluations she had never received a report where the evaluator had conducted an IQ test but failed to provide the score. (T.IX, p. 28). Dr. Shea also noted that it was very uncommon for an evaluator to conduct an IQ test and then not report the scores. (T.XVIII, p. 234).

49. An IEP meeting was held on August 14, 1996, and the []s attended with their attorneys. (T.IX, p. 32); (Resp. Exh. 68). At that time the committee began developing goals and objectives for the IEP based on the evaluation reports, the observations, and the []s input regarding []'s progress in her home program. (T.X, p. 188) (T.IX, pp. 42-43). The present level of performance in many areas of the IEP was developed based solely on parent report because no other information about []'s skill levels was available at that time. (T.X, p. 225).

50. At this same time, []'s monthly documentation in the home program noted that "[] has forgotten a lot of information. Much of what she learned was never generalized completely." (Resp. Exh. 197). [] testified that she realized [] had not generalized skills after receiving Dr. Boyle's report. (T.V, P. 101).

51. After the August 14 meeting the []s requested that another meeting be held in mid-September so that their Lovaas consultant, Michael Guiou, could attend to participate in the IEP development. (Resp. Exh. 69) (T.X, p. 189). A meeting was held on September 13, 1996, which the []s attended along with Mr. Guiou. (T.IX, pp. 49-51).

52. Despite the fact that [] was having significant behavioral problems at home and in school at that time, the []s and Mr. Guiou did not share that information with school personnel. (T.V, p. 231) (T.IX, pp. 51-52). [] also indicated that she could not recall if she had shared information on []'s aggressive behaviors with Dr. Boyle and Dr. Handleman when they evaluated []. Dr. Boyle testified that he had no information about []'s behavioral status at the time of his evaluation. (T.XV, p. 68). However, the []s later criticized school personnel for not having created a behavioral management plan for []. (Resp. Ex. 157).

53. On September 23, 1996, a final IEP meeting was held and the []s attended along with their attorneys. (Resp. Exh. 70); (T.IX, p. 53). At that time the parents and school personnel all agreed that the goals and objectives on the IEP were appropriate. (T.X, p. 190). The committee then discussed possible placements for []. There was extensive discussion of her need for one-on-one instruction and her need for development of social and communication skills. The committee proposed that [] spend half of the school day in a regular kindergarten class with a one-on-one assistant; one hour a day working independently with monitoring in Laurie McDanel's classroom for autistic students, and one and a half hours a day receiving one-on-one instruction in academic areas in a separate room with Laurie McDanel. (T.X, pp. 191, 199). The IEP also called for three hours a week of speech services (two hours of direct services and one hour of consultation between the speech therapist and []'s teachers). (T.IX, pp. 57).

54. The kindergarten time would be used to work on []'s social skills and communication skills because in the classroom she would have opportunity for peer modeling and interaction. (T.X, p. 200). The one-on-one instruction could include some discrete trial teaching but would not be limited to that one method of instruction. (T.X, pp. 199-200). Ms. McDanel described in detail how she would teach each of the objectives in []'s IEP. (Resp. Exh. 172-B). In guided practice, [] would work in her specific work area in the classroom doing work that had been taught in the one-on-one setting. (T.X, pp. 230).

55. Laurie McDanel's classroom has two teaching assistants both of whom have been trained to work with autistic students. (T.X, p. 7). One of the teaching assistants has an autistic child. (T.X, p. 7). There are seven students who spend some time each week in Ms. McDanel's class; four of the students are not in the classroom full-time as they are mainstreamed for parts of the school day. (T.X, p. 19). Ms. McDanel testified that had [] joined the class, another teaching assistant would have been hired for the classroom. (T.X, pp. 28, 115). She noted that she would have proposed that [] attend the kindergarten class for the morning and come to the autistic class in the afternoon. (T.X, p. 117).

56. A primary goal in Ms. McDanel's classroom is to teach the students to work independently. Each student works independently for part of the day. Data is kept by the teacher and teaching assistants as to how well the student is completing his or her individual work and progress is noted on the student's IEP. (T.X, pp. 51-52). A daily anecdotal log is kept of the each mainstreamed student's progress in the regular classroom. (T.X, p. 54).

57. Ms. McDanel described the progress of many autistic students in her classroom, particularly in developing

independence and communication skills. (T.X, p. 153). To teach functional language, Ms. McDanel attempts to have the students communicate about areas of interest by setting up play activities in the classroom and by allowing the student to take the lead in choosing activities to communicate about. (T.X, pp. 155-156).

58. Based on her observation of [] in therapy, her review of []'s records and her review of videotapes of [] at Covenant Academy and in her home therapy, Ms. McDanel testified that [] was not functioning as independently as had been reported by her parents or as independently as other autistic students in Ms. McDanel's classroom. (T.X, pp. 192-193). Specifically, Ms. McDanel noted she was concerned that [] was unable to do work in a small group without constant prompting from her assistant. (T.X, p. 193). Ms. McDanel also stated that [] did not display the communication skills that many of the students in her classroom have. (T.X, p. 218). This was true despite the fact that Dr. Wynn testified that 80 percent of the Lovaas program is "language" and developing communication skills. (T.XIII, p. 110).

59. Sloan Burgess described her role as a consultant to Ms. McDanel's classroom. (T.XVIII, pp. 7-8). Ms. Burgess assists Ms. McDanel in educational planning for the students. (T.XVIII, p. 17). Ms. Burgess testified that she had seen great progress in the students in Ms. McDanel's class, particularly in the area of language development. (T.XVIII, pp. 19, 49-50). Having reviewed a videotape of [] in November 1996 at school, Ms. Burgess indicated that she was concerned about []'s dependence on her assistant and her lack of spontaneous language and initiation of play with peers. (T.XVIII, pp. 55-56). Ms. Burgess said she would have expected much more progress in those areas had [] been in a TEACCH classroom for two and a half years instead of in the Lovaas program. (T.XVIII, p. 56).

60. Dr. Lee Marcus, the Clinic Director of TEACCH in Chapel Hill, testified about the TEACCH program. (Resp. Exh. 224). In his 23 years working at TEACCH, Dr. Marcus has worked with thousands of autistic individuals. TEACCH's primary mission is to work in North Carolina. but Dr. Marcus indicated that TEACCH training and programs are set up in every continent except Antarctica and in many states across the U.S. (T.XIX, pp. 36-39).

61. Dr. Marcus described the underlying philosophy of the TEACCH classroom in fostering independence and communication skills in the students. He explained that unlike Lovaas. TEACCH is not a teaching technique but rather an umbrella structure for the classroom that allows students to become independent and to use language functionally while working on their individualized educational goals and objectives. (T.XIX, pp. 144-147). He noted that TEACCH and Lovaas have different philosophies about autism. (T.XIX, p. 139). TEACCH believes that autism is a unique disorder explained by cognitive characteristics and that individuals with autism should be provided a structure and taught strategies to make the world more understandable to them. (T.XIX, p. 50). The Lovaas approach, on the other hand, believes that autism is a made up of a group of behavioral deficiencies which can be repaired so that an individual is "recovered" or becomes "indistinguishable" once taught a series of standard programs and drills. (T.XIX, pp. 140-141). Dr. Marcus testified that he has never seen an individual who has "recovered" from autism and that he believes it is not a realistic goal for parents. In fact, he stated that such a goal creates expectations which are too high and does not allow for the parents to accept the reality of having a child with autism. (T.XIX, pp. 161-174).

62. Although Dr. Blacher testified that the focus of the TEACCH program was to prepare students for sheltered

workshops, (T.VII, p. 299) both Dr. Marcus and Sloan Burgess stated that in their experience with the TEACCH program they have witnessed myriad outcomes of students ranging from obtaining graduate degrees and having families to working in a sheltered workshop. TEACCH's goal is to assist autistic individuals in becoming as independent and functional possible. (T.XIX, pp. 25-28).

63. Dr. Shea testified that in her opinion the placement proposed for [] by the Henderson County Schools was appropriate and would benefit [] more than a continuation of the Lovaas program. (T.XVIII, p. 238). Dr. Shea opined that []'s program needed to emphasize functional language and the development of independence, two areas of significant weakness which were not being adequately addressed through the Lovaas program. (T.XVIII, pp. 218-219). The time in the proposed placement for guided practice and provision for mainstreaming with an assistant to monitor her progress, would encourage independence. She noted that the TEACCH approach to teaching communication which is incorporated into Ms. McDanel's classroom, could benefit [] by lessening the focus on verbal communication and supplementing language with visual cues. (T.XVIII, p. 248). Dr. Shea stated that Dr. Boyle's testing and her observations indicated that [] is a visual learner and the Lovaas focus on oral language appeared overwhelming to [] at times. (T.XVIII, pp. 245-246).

64. [] disagreed with the proposed placement for the 1996-1997 school year and stated that they wanted the school system to pay for their home program. Both [] and [] testified that the only program they would have accepted for [] was the Lovaas program. (T.VI, pp. 110).

65. Although Dr. Blacher testified that the placement proposed by the school system was too restrictive, it was actually less restrictive under North Carolina standards than

[]'s home program because it provided for more time per week for [] to be educated with regular education peers and in the regular school environment. (Resp. Exh. 10) (T.IX, p. 72).

66. School personnel considered the []'s request that [] be continued in the Lovaas program but believed that the school system's proposed program was more appropriate. Judy Cook testified that she believed the Lovaas program was not appropriate for [] for the 1996-97 school year. (T.IX, p. 73). She stated that the program was too intensive in that it required that the child undergo therapy for 40 hours a week (or more in []'s case). (T.IX, pp. 73-74). She believed that the constant one-on-one caused [] to become too dependent on adults and that []'s social and communication skills were not being effectively developed. (T.VI, p. 132, 144; T.IX, p. 74).

67. Laurie McDanel testified that she believed the proposed program would be better for [] for the 1996-97 school year than the Lovaas program. (T.X, p. 233). Specifically, she noted that it would allow []'s placement in a true kindergarten class to develop her social and communication skills which are her areas of greatest need. (T.X, p. 233). Also the proposed IEP would allow for [] to become more independent be spending time each day without consistent prompting or one-on-one assistance. (T.X, p. 234).

68. Rather than enrolling [] in the respondent's schools for the 1996-97 school year, the []s continued to implement the Lovaas program. [] testified that the total expected cost of the home program for the 1996-97 school year would be between $45,000-$50,000. (T.XVII, pp. 19-21). Judy Cook testified that the average amount spent on autistic students by the county is $11,000 a year (T.IX, p. 180) and that offering the Lovaas program to any autistic student in the county whose parents requested it would have a staggering financial

impact on the school system. (T.IX, p. 92). Ms. Cook additionally noted that in light of her significant concerns about the Lovaas therapy, even if she had unlimited funds she would not recommend Lovaas therapy for students. (T.IX, p. 94).

69. [] testified about her administration of []'s Lovaas program prior to the 1996-97 school year. She stated that she had hired 20 different therapists to work with [] between December 1993 and December 1996. Many of the therapists worked for less than six months with []. (T.IV, pp. 154-175). Most of the therapists had no background in education and no experience working with children with autism. (T.IV, p. 184).

70. Caroline Dilworth was hired by the []s in June 1995 after just completing college with a degree in psychology. (T.XII, p. 7). She had no previous experience working with autistic students or the Lovaas program. During the 1995-96 school year she served as []'s one-on-one assistant in her private school classroom. Dr. Jacqueline Wynn, the assistant director of the Lovaas Institute, testified that the Lovaas program recommends that an assistant have at least nine months of experience in the program before accompanying a child into a classroom and the bare minimum would be six months of experience. (T.XIII, pp. 78, 218). Caroline had just two months of experience when she went with [] to school. (T.XIV, p. 172).

71. Beginning in September 1996 Caroline Dilworth took over the position of administrator of []'s program. She and the []s testified she worked full-time, at approximately forty hours a week, for the []s. Ms. Dilworth testified that []'s program consists of over 47 hours weekly including home therapy, school, peer play and speech therapy. (T.XIV, p. 174). There are three other therapists who work with []. (T.XIV, p. 189). Dr. Wynn testified that the Lovaas program

recommends only between 35-40 hours a week of therapy. (T.XIII, p. 249). The information materials of the Lovaas Institute provided to the []s describe the "workshops" like the []s that are distant from UCLA and coordinated by a consultant as being only 30 hours per week. (R.Exh. 184, p. 4).

72. [] testified that program changes were made by Michael Guiou who conducts two day workshops with the therapists every three months. (T.IV, p. 188). Mr. Guiou at the time he began working with [] had recently graduated from college. He works in Los Angeles and is available by phone to discuss []'s program. Dr. Marcus indicated concern with this consultation model in which program changes are made by an individual who is so far removed from the student. (T.XIX, p. 156).

73. [] attends a Christian "academy" for four and a half hours a day and is accompanied by Caroline Dilworth. Ms. Dilworth also provides therapy at home and during peer play. (T.XIV, pp. 191-192). Ms. Dilworth acknowledged that although the Lovaas program advises that one therapist not spend more than 15 hours with a child each week, she spends approximately 27 hours a week with []. (T.XIV, pp. 192-194). The Lovaas program literature indicates that too much time with one therapist can lead to dependence by the child on the individual therapist. (Resp. Exh. 174).

74. At the beginning of the 1996-97 school year there were six students in []'s class at Covenant Academy. Until February 1997 the class was taught by Tina Salter who had little teaching experience and no experience working with students with autism. Ms. Dilworth testified that Ms. Salter did not do a good job using classroom materials and structuring the school day. (T.XIV, pp. 178-179). Ms. Salter was terminated from her employment at Covenant Academy in late fall and replaced by Kate Scharstein, a parent of an

autistic student, was a college graduate but who had no training or experience as a teacher. (T.XIV, p. 145).

75. By the time of the hearing in March there were eight full time students and two part time students in the class. [] had been in a class with approximately 15 students during the past two school years. (T.VI, p. 17). Dr. Wynn stated that the Lovaas program's goal was to gradually introduce a student into social and group settings as therapy progressed. (T.XIII, p. 217) She stated that a class size of 14-15 students, like []'s class during the 1994-96 school years and similar to the regular kindergarten class proposed in the Henderson County schools, was the right size class (T.XIII, p. 218). She indicated that if the class was much smaller, like [] class at Covenant Academy during the 1996-97 school year, problems might occur. (T.XIII, p. 218). Dr. Wynn also stated that where an autistic student is functioning socially and in language skills at the kindergarten level (even if the student is older than kindergarten age), the appropriate placement for working on those skills would be a kindergarten class. (T.XIII, pp. 221-222). She acknowledged that The Me Book, written by Dr. Lovaas, states that the age of the classroom grouping is not as important as the functioning level of the peers in the class. (T.XIII, p. 222).

76. Ms. Dilworth stated and her records reflected that she frequently removed [] from the Covenant classroom either for bad behavior or when [] was distracted and not paying sufficient attention to her classwork. (T.XIV, p. 294).

77. While in []'s classroom, Ms. Dilworth also provided assistance to other students. This included assisting the students with religious instruction. (T.XIV, p. 294).

78. Dr. Wynn described the Lovaas program as being composed of a hierarchy of skills. (T.XIII, p. 97). She stated that documentation of mastery was vital to the program

because it illustrates when the student is ready for the next skill to be taught. (T.XIII, p. 97). [] described thousands of pages of logs kept on []'s program. However, she also acknowledged and the documents revealed that many skills once thought "mastered" by [] had to be retaught. (T.V, p. 101) (Resp. Exh. 197). (T.XVII, p. 217). Kate Scharstein, a witness for the []s and the parent of an autistic student who also was using the Lovaas program, stated that in her experience with the program she never had to reintroduce a skill to her son as once a skill was "mastered" it no longer had to be worked on.

79. There was no testimony that [] needed the Lovaas method in order to make progress. In fact, Kate Scharstein, her teacher and Karen Perella, her speech therapist, testified that they did not exclusively use the Lovaas method when working with []. Ms. Dilworth testified that beginning in February 1997, Lynn Gilpin began working in the Covenant classroom one day a week to teach reading to the students. Ms. Gilpin had no Lovaas training. She worked with [] one-on-one on reading and did not use the discrete trial method. (T.XIV, pp. 157-158).

80. The testimony and evidence indicated that [] developed aggressive behaviors including biting, kicking and head butting while in the Lovaas program. [] testified these behaviors developed after two years of Lovaas therapy. The monthly reports prepared by Caroline Dilworth for Michael Guiou show that aggressive behaviors were of significant concern in the fall of 1996 and as late as January 1997 both at home and in school (T.VI, pp. 100-106). (Resp. Exh. 198).

81. [] and Caroline Dilworth testified that Michael Guiou recommended a variety of behavioral techniques to use with [] and none of the techniques were successful. (T.IV, pp. 242-243). Ultimately, [] decided to start spanking [] for her aggressive behaviors. (T.VI. pp. 10-11). Dr. Shea testified

that her review of []'s behavioral records led her to the conclusion that the behavioral techniques used with [] did not address the probable root causes of the behavior but rather simply punished [] for the behaviors. (T.XVIII, p. 186). Dr. Shea noted that negative behaviors are typically seen with autistic students when they are frustrated by an inability to understand language or social nuances. (T.XVIII, p. 181). No effort was made to modify []'s environment to reduce these frustrations; rather, [] was punished for her behavior.

82. Karen Perella, []'s speech therapist, testified that she did not see any aggressive behaviors in therapy where she did not use a strict Lovaas approach and she was not aware that aggressive behaviors were a problem. (T.XV, p. 242). She acknowledged that if [] were exhibiting aggressive behaviors it would cause her significant concern. (T.XV, p. 243).

83. Laurie McDanel, Faye Arledge and Sloan Burgess testified that in their experience working with autistic students in the TEACCH classrooms, it was very rare for a student's behavior to get worse with time. In fact, they each testified that students' behaviors typically became better in the classroom as they learned to communicate and learned the classroom routine. (T.X, p. 194; T.XVIII, p. 64). Dr. Wynn testified that aggressive behaviors are typically seen at the beginning of a child's program and decrease over time. (T.XIII, p. 245). She stated that it would be unusual to see a child's aggressive behaviors increase over time. (T.XIII, p. 246).

84. There was no testimony regarding how long the Lovaas therapy would need to be continued with []. Dr. Wynn testified students stay in the program six years or longer and that there is no typical time frame. (T.XIII, pp. 131-135, 217). When asked about the length of []'s program,

[] stated that Michael Guiou would have to answer that question. (T.IV, p. 197). When pressed, [] noted that [] was close to the end of the formal programs and that "the next few years" would be fine-tuning her skills in the program. (T.IV, p. 197). Later in cross-examination she stated there was a lot of fine-tuning to be done and she did not know whether [] was near the end of her programs. (T.VI, p. 110). Michael Guiou was never called to testify by petitioners.

85. In February the []s took [] to be reevaluated by Dr. Boyle. (Resp. Exh. 62). The testing showed that []'s academics were still on beginning kindergarten level (as they had been during his testing eight months earlier). (T.X, p. 225-226) (Resp. Exh. 61). Although [] could decode words at the beginning second grade level she was completely unable to perform on the comprehension tests. (T.X, p. 226). The IQ testing again showed [] to be functioning in the mild mentally handicapped range. (Resp. Exh. 61).

86. Dr. Boyle also conducted some testing of []'s expressive and receptive language. (Resp. Exh. 61). Karen Perella testified that when comparing her results of testing [] in 1995 with Dr. Boyle's 1997 results, [] had not made much progress particularly in her receptive language. (T.XV, p. 239).

87. The Lovaas study cited by petitioners which found 47% of the nineteen subjects "indistinguishable" after three years of Lovaas therapy, relied on two criteria for determining whether a student was "indistinguishable": an IQ score in the normal range and the child's placement in a regular education class without assistance. (Pet. Exh. 7, 11, p. 5); (T.X111, p. 186). Eight other students who were not in the best outcome group showed improvement in verbal skills and in reduction of behaviors. (T.XIII, p. 190). Dr. Wynn testified that an IQ score after three years in the program

could be used as a good predictor of the child's school performance. (T.XIII, pp. 238, 239).

88. Based on []'s IQ score and class placement she is not in the Lovaas "best outcome" group and she also has not shown improvement in reduction of negative behaviors during her three and a half years in the program. (Resp. Exh. 61, Pet. Exh. 7, Lovaas Studies, p. 81). In fact her negative behaviors increased over her 3 years in the Lovaas program. Dr. Marcus testified that his review of []'s record's did not reveal evidence of significant progress during the three year period she had been in the Lovaas program. (T.XIX, p. 183).

89. Dr. B.J. Freeman, a professor of Medical Science at the University of California at Los Angeles and an expert in autism, testified that she reviewed []'s records, watched videotapes of [], and observed in the two TEACCH classrooms in the Henderson County schools. (T.XVI, pp. 116-122).

90. Dr. Freeman was involved in diagnosing almost all of the students in the original Lovaas study, has trained in discrete trial methodology, is familiar with the literature on the Lovaas methodology, and has worked with students who have been in the Lovaas program. (T.XVI, pp. 56-62). She testified that the Lovaas methodology remains very experimental and that it is not a good method for teaching students functional language and that its focus on instruction for 40 hours a week or more is too intense for young students. (T.XVI, p. 78).

91. Dr. Freeman stated that she believed the Lovaas program was not appropriate for [] for the 1996-97 school year. She believed that it was time for [] to try new techniques. She recognized, and observed in Laurie McDanel's classroom, that one-on-one discrete trial teaching was utilized with reinforcements (T.XVI, pp. 267-268). She

testified that although it was clear [] developed some skills early in the program, her immediate needs reflected in her evaluations and in the goals agreed to in the IEP in the areas of communication, independence and socialization required a change in program. She stated that it was clear the Lovaas program was not properly addressing these areas of weakness which are the areas of core deficit in autism. (T.XVI, p. 209). Specifically, she pointed to the results of Dr. Boyle's testing which showed significant receptive language difficulties. (Resp. Exh. 61) (T.XVI, pp. 110-114).

92. Dr. Freeman testified that the TEACCH program is considered a model program and has been adopted all over the world. (T.XVI, p. 91). Her experience in observing in TEACCH classrooms is that the TEACCH model provides a structure which allows students to become independent and to develop functional language through a natural language environment. (T.XVI, pp. 84-85). She testified that she observed Ms. McDanel's classroom and observed autistic students being mainstreamed into regular kindergarten and first grade classes. (T.XVI, p. 143). She believed that the regular kindergarten class and Ms. McDanel's class were both appropriate for []. (T.XVI, p. 153-155). Dr. Freeman indicated that she would like to see the amount of one-on-one assistance for [] reduced as quickly as possible so that [] can learn to work independently in more normalized settings. (T.XVI, p. 155).

93. Dr. Marcus and Ms. McDanel testified about the importance of having a teacher with a degree in teaching and specific knowledge of autistic students working with [] because the individual needs to know the continuum of educational steps needed to teach a particular skill. (T.XIX, pp. 153-155) (McDanel, T.X, p. 114). Dr. Wynn testified that despite the fact that students are now staying in the Lovaas program beyond pre-school, her staff does not have training or course work on the standard curriculum for

elementary school grades in terms of teaching reading, math and writing in a sequenced method. (T.XIII, pp. 256-257).

94. Judy Cook testified that the []s in IEP meetings requested that she "guarantee" that [] would not regress with a change of programs. (T.VIII, p. 114). Ms. Cook testified that she did not believe [] would regress in the proposed program but that she could not make a "guarantee" to the parents. (T.VIII, pp. 115-116). Although Dr. Blacher testified that the research showed that students regress with a program change, none of the experts on autism agreed with her. Dr. Freeman testified that she knew of no research which showed such regression. (T.XVI, p. 162). Dr. Shea testified that the IEP itself was structured to facilitate []'s transition from the Lovaas program to the school system environment. (T.XVIII, p. 241-246). As a result, she did not believe [] would regress if enrolled in the Henderson County schools. She noted that [] might forget material that she had memorized in Lovaas therapy which had no functional value, but that regression should not be expected to occur. (T.XVIII, p. 244). Dr. Marcus testified that he would not expect a child to regress simply by moving from one type of program to another. (T.XII, pp. 181-182). He stated that he would expect [] to do well within the TEACCH structure since her testing indicated that she is a visual learner. (T.XIX, pp. 182-183).

95. Petitioner presented evidence supporting the premise that [] is, as all Lovaas trained children are, to be weaned from the Lovaas program as she progresses and achieves independence in group settings. []'s proposed IEP includes the assistance of a one-on-one aide or "shadow" provided by the public school system. []'s assistant needs to be trained in the Lovaas method to assist [] in her transition to the public school system.

Based upon the foregoing Findings of Facts, the undersigned makes the following:

Conclusions of Law

1. The IDEA, 20 U.S.C. § 1400 et seq., is the federal statute governing education of students with disabilities. The federal regulations promulgated under the IDEA are codified at 34 C.F.R. Parts 300 and 301.

2. The controlling state law for students with disabilities is N.C.Gen.Stat. Section 115C Article 9 and the corresponding state regulations including the State Procedures Governing Programs and Services for Students With Special Needs Sections 1501-1541 (1993).

3. [] is a student with a disability for purposes of the IDEA and corresponding State law.

4. Respondent is required under federal and state law to make available special education and related services to [] and to offer her a free appropriate public education as that term is defined under the IDEA, and State Procedures.

5. At its core, the dispute between the parties is a debate over a choice of educational methodology for the teaching of autistic children. The two methods at issue are the Lovaas method and the TEACCH method.

6. It is the province of the school district and local educators, and not that of the courts, to choose sound educational methods when implementing the provisions of IDEA. Bd. of Education v. Rowley, 458 U.S. 176 (1982); Hartmann v. Loudon, 118 F.3d 996 (4th Cir. 1997); Barnett v. Fairfax County Sch. Bd., 927 F.2d 146 (4th Cir. 1991).

7. In the absence of procedural or substantive violations of law, courts will not order school authorities to implement a particular educational method when the school has chosen an appropriate educational method.

8. Respondent has complied with all procedural safeguards required by IDEA.

9. Respondent has implemented the TEACCH model and it is an appropriate program for the education of autistic students.

10. A free appropriate public education, as required by IDEA is one that is "reasonably calculated to allow the child to make reasonable progress."

11. Under North Carolina law, respondent is required to provide petitioner a sound basic education commensurate with that given other students. Leandro v. State of North Carolina, No. 179PA96, 1997 N.C. LEXIS 486 (N.C. July 24, 1997); Harrell v. Wilson County, 58 N.C. 260 (1982); G.S. § 115C et. seq. The state standard for an appropriate education is higher than required by federal law. The State is to ensure that every child receives a "fair and full opportunity to reach his full potential." G.S. § 115C-106. However, this does not mean that a school system must provide utopian educational programs for children with special needs anymore than they are required to provide utopian educational programs for nonhandicapped students. Harrell, supra. Respondent's educational program offered to [] the opportunity to receive a sound basic education commensurate with that given to other autistic students.

12. Respondent's educational program offered to [] during the 1996-97 school year, with one exception, was reasonably calculated to allow [] to make educational progress and to provide [] with a free appropriate public education in compliance with the IDEA and state law. In

order for [] to maximize the opportunity provided to her in the public school system, respondent's educational program for the 1996-97 school year should include a provision that the one-on-one assistant provided by the school system be trained in the Lovaas method to assist [] in her transition to public school.

13. The Lovaas program has been of value to [] during her preschool years. However, this was a choice made by []'s parents just as any parent makes a choice regarding private schooling. The Lovaas program implemented during the 1996-97 school year is not provided in the least restrictive environment and is no longer appropriate to meet []'s needs.

14. When choosing an educational method, the school district may consider as a factor the feasibility of implementing a particular method. Barnett v. Fairfax County Sch. Bd., 927 F.2d 146 (1991). Implementation of the Lovaas method is not feasible and is unduly burdensome on the school system.

15. Petitioners are not entitled to reimbursement for the 1996-97 school year because the educational program offered by respondent is appropriate as defined by IDEA. Burlington School Comm. v. Massachusetts Department of Education, 471 U.S. 359 (1985).

16. Petitioners are not entitled to compensatory education for the 1993-1996 school years because they claim that petitioner received an appropriate education during that time period.

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned makes the following

Final Decision

1. []'s proposed IEP for the 1996-1997 school year was appropriate; however, in order for the IEP to provide the maximum educational benefit to her, the one-on-one aide should be trained in the Lovaas method (discrete trial method) in order to assist [] in the transition to the public school system and the TEACCH program.

2. This cause is retained for further orders as may be just and proper.